United States Court of Appeals

FOR THE NINTH DISTRICT

No. 21990

TOTAL TELECABLE, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents,

KVOS TELEVISION CORPORATION,

Intervenor.

On Petition for Review of Orders of the Federal Communications Commission

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

JURISDICTIONAL STATEMENT

This is a petition for review of memorandum opinions and orders of the Federal Communications Commission, released April 4 and July 14, 1967, ordering petitioner to comply with Section 74.1103(e) of the Commission's Rules,

47 C.F.R. 74.1103(e). The petition for review was filed under Section 402(a) of the Communications Act of 1934, as amended, 66 Stat. 718 (1952), 47 U.S.C., Section 402(a), and Sections 2 and 3 of the Judicial Review Act, 64 Stat. 1129, 1130 (1950), 28 U.S.C. 2342 and 2343. The petitioner seeks review of a Commission order (7 F.C.C. 2d 611, R. pp. 110-114), released April 4, 1967, denying a petition for waiver of Section 74.1103(e) of the Commission's Rules, 47 C.F.R., Section 74.1103(e) and, additionally, a denial of a petition for reconsideration (8 F.C.C. 2d 997, R. pp. 140-142), released July 14, 1967.

Section 402(a) of the Communications Act provides that "any proceeding to enjoin, set aside, annul, or suspend any order of the Commission" under the Act shall be in the manner prescribed by the Judicial Review Act. Section 2 of the Judicial Review Act, 28 U.S.C.Section 2342, provides in subsection (1) the court of appeals has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part) or to determine the validity of all final orders of the Federal Communications Commission made reviewable by section 402(a) of the Communications Act. The orders complained of here directing petitioner to alter its business are final orders of the Commission within the meaning of Section 402(a).

Section 3 of the Judicial Review Act, 28 U.S.C. Section 2343 provides that venue "it in the judicial circuit in which the petitioner resides or has its principal office, or in the United States Court of Appeals for the District of Columbia Circuit." Petitioner herein has a principal office at 216 Norton Building, Seattle, Washington, within this Circuit, and the business conducted by it which is the subject of the Commission's order is located entirely in the State of Washington. Accordingly, jurisdiction and venue are in this Circuit.

STATEMENT OF THE CASE

Before examining the particular facts in this proceeding, it may be well to review briefly the history of CATV and its treatment by the Federal Communications Commission.

1. History of CATV

The Commission has defined a CATV system "as a facility which receives and amplifies the signals broadcast by one or more television stations and redistributes such signals by wire or cable to the homes or places of business of subscribing members of the public for a fee." *First Report and Order,* 38 F.C.C. 683, 684 N. 1 (1965). CATV or, as it is also called, "cable television" was first used in the mountainous regions of Pennsylvania in 1950. The systems there were designed to bring signals to areas unable to receive television because of the mountainous shield. The systems consisted of antennas erected on mountain tops and connecting cable lines to the communities serviced. An installation fee and a monthly service charge were made to recover the cost of antennas, to maintain the distribution system, and also to provide a return on investment.

After this first successful venture, CATV was used to bring television to regions situated beyond the normal range of any television broadcast stations. Since television signals travel in straight lines and do not follow the curvature of the earth, towns more than 70 miles from a station were not generally able to receive television. Again by erection of high television towers, the TV signals could be received in remote regions and carried by coaxial cable into the community. Even greater distance could be covered by the erection of microwave relay stations to re-transmit signals and send them by direct line to receivers in distant communities. Thus, the earliest use of CATV systems was to bring television to people who had none.

The first equipment used transmitted only one television signal. However, this equipment was improved and refined

so that five-channel equipment was soon available, allowing CATV operators to bring all major networks into the remote regions. Additionally, this advance enabled CATV to service cities with one television station by bringing in other network programs. With this added five-channel service, CATV enjoyed a tremendous growth. During the decade of 1956 to 1965, the industry grew in the United States from 400 to more than 1,600 systems. The number of subscribers jumped from 14,000 in 1952 to 2,500,000 subscribers in 1967. Currently about 5 percent of all television reception in the United States is through CATV.

Within the last two years, CATV has taken another dramatic turn. Even in major metropolitan areas which now receive all three major networks, CATV, with its present capacity of bringing 12, 20, and even 40 channels, has established a service market. Two such examples are in New York City and Los Angeles, California. The service by CATV in these cities is somewhat different from the remote areas. First, it offers finer reception by eliminating the interference problem caused by high buildings, electrical spheres, airplanes and other air disturbances. Additionally, color television requires a finer signal than black and white, and CATV provides quality signals.

Still another development in CATV progress has been program origination over the closed cable circuits, designed to serve particular needs and tastes of local communities or elements of these communities.

CATV expansion, in its short history, has been phenomenal. The growth and the breadth of services will also be phenomenal, if it is given equal status and permitted freely to compete with other communications media without unreasonable restriction relegating it to second class status.

CATV, along with telephone, telegraph, radio and television, should be permitted to take its place as an important but independent means of communication.

2. CATV Regulations

Federal regulation of CATV is of recent origin. The first F.C.C. action relating to CATV[1] was in 1956 and concerned the limits of cable radiation of energy by CATV systems. This action was consistent with the Commission's practice of protecting radio and television signals from interruption by electrical interference. In 1959, after a two-year investigation of "auxiliary" services of television broadcasting, the Commission issued a report and order[2] holding that it did not have jurisdiction under the Communications Act of 1934 to regulate CATV systems.

The Commission stated:

> "It is urged that we should regulate CATV's under our 'plenary power' over communications. Some parties have cited to us in this connection various subparagraphs of Section 303 of the act, under which we are empowered to . . . make such rules and regulations . . . as may be necessary to carry out the act (sub-sections (a), (b), (f), (g), (i), (r)).

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[1] *In re Incidental and Restricted Radiation Devices, Third Report and Order*, Docket No. 9288, 21 Fed. Reg. 5366, 13 Pike and Fischer R.R. 1546a (1956).

[2] *In re Notice of Inquiry into the Impact of Community Antenna Systems, TV Translators, TV "Satellite" Stations, and TV "Repeaters" on the Orderly Development of Television Broadcasting, Report and Order*, Docket No. 12443, 26 F.C.C. 403 (1959).

> However, we do not believe we have 'plenary power' to regulate any and all enterprises which happen to be connected with one of the many aspects of communications." (26 F.C.C. at 429)

The Commission also rejected as absurd an economic protectionist basis of CATV regulations.

> "In essence, the broadcaster's position shakes down to the fundamental proposition that they wish us to regulate in a manner favorable toward them vis-a-vis any non-broadcast competitive enterprise, . . . as closed-circuit music and news services, closed-circuit theatre television operators, and, possibly, even ordinary motion picture and legitimate stage operators, magazine and newspaper publishers, etc., comprising all of the entities which compete with broadcasting for the time and attention of potential viewers and listeners. *The logical absurdity of such a position requires no elaboration.*" [Emphasis added.] (26 F.C.C. at 431)

After this disclaimer of jurisdiction over CATV, the Commission requested Congress to pass certain remedial legislation conferring limited jurisdiction over CATV. The proposed legislation contained in S. 2653, 86th Cong. 1st Sess. (1959) was defeated after long and bitter debate by a vote to recommit the bill. A second attempt by the Commission in 1961 to gain jurisdiction over CATV died in committee. A 1966 bill to confer jurisdiction over CATV also failed.[3]

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[3] A legislative history of the Commission's unsuccessful attempts to gain jurisdiction is contained in Appendix A, *infra*, p. 1a.

Following these unsuccessful attempts to obtain Congressional grant of jurisdiction, the Commission in a series of proceedings culminating in the *Second Report and Order,* 2 F.C.C.2d 725 (1966), reversed its 1959 ruling and assumed regulatory control over CATV systems under its rule making procedures. The first proceeding in 1962 proposed that the rules relating to microwave relay be amended to require microwave facilities serving CATV systems to insure that the CATV system carry local stations and refrain from duplicating the local station's programming for 30 days.[4]

A year later in 1963, the Commission issued a further notice of proposed rule making[5] to modify the non-duplication condition to provide for a 15-day program protection and extend the carriage and non-duplication rules to common carrier microwave radio relay stations used to serve CATV systems. The Commission did not hold hearings or oral arguments on its proposals. Six months after the closing of the record in the pending notices, the Commission issued the *First Report and Order,* 38 F.C.C. 683 (1965), requiring microwave-CATV systems, upon request, to carry the signals of all local and nearby television stations and to refrain from duplicating the programs broadcast by such stations, either simultaneously or within 15 days before or after local broadcast. The Commission's adoption of these rules was based on its conclusions that: (1) a CATV system's failure or refusal to carry the signal of a local station and duplication of a local station's programming constitute "unfair competition";

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[4] Notice of Proposed Rule Making in Docket No. 14895 (27 Fed. Reg. 12586 (1962)).

[5] Notice of Proposed Rule Making in Docket 15233 (28 Fed. Reg. 13789 (1963)).

and (2) action is needed to ameliorate the adverse effects of CATV competition upon the maintenance and healthy growth of television broadcast service (38 F.C.C. at 713). The Commission concluded with this extraordinary statement:

> "[W]e think every station affected is entitled to appropriate carriage and non-duplication benefits *irrespective of the specific damage which any individual CATV system may do to the financial* health of the individual station," [Emphasis added.] (38 F.C.C. at 713)

Upon issuance of the *First Report and Order*, the Commission also issued a *Joint Notice of Inquiry and Notice of Proposed Rule Making* in Docket No. 15971, 1 F.C.C.2d 453 (1965), which contained as Appendix B a "Memorandum on its Jurisdiction and Authority", concluding that the Commission had jurisdiction to regulate *all* CATV systems, irrespective of the use of microwave facilities, and proposing to make the Rules concerning carriage and non-duplication conditions applicable to all CATV systems.

Commissioner Loevinger very forcibly dissented from this assumption of Jurisdiction:

> "However, it seems to me that the most basic and important issue involved here is far more important than the interests of the broadcasters, the CATV's, or even of the audience in securing broadcasting service. The basic issue involved here is whether a great Government agency will show reasonable respect for its own precedents and reasonable restraint in seeking to extend the scope of its own power. Undoubtedly the independent regulatory agencies have been given great power and broad

discretion in its exercise. But if democratic government is to survive, the corollary of great power and broad discretion must be a strong impulse of self-restraint in the exercise of such power. In the face of statutory language, the Commission's own precedents, the prior statements of the Commission to the courts, and its requests to Congress for legislation on this subject, it seems to me to be presumptuous for the Commission now to assert jurisdiction which it has previously explicitly disclaimed. If the laws are inadequate to cope with the problems of the moment, it is the function of Congress to remedy that lack. There is no reason to assume that Congress is any less responsive than the Commission to the public interest, or that it is unable or unwilling to act if action is needed in this field at this time. I am, accordingly, compelled to dissent from the Commission's efforts to extend its jurisdiction without specific Congressional authority." (1 F.C.C.2d 495 (1965))

After receiving the comments solicited in its Notice of Inquiry, without evidentiary hearing or oral argument and before issuing any further specific rule proposals, the Commission, on February 15, 1966, released a Public Notice G, No. 79927, announcing that it planned to adopt new rules to regulate all CATV systems. The rules were adopted by the Commission on March 4, 1966,[6] released to the public on March 17, 1966,[7] and made effective April 17, 1966.

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[6] Public Notice G, No. 80850 (March 8, 1966).

[7] *Second Report and Order*, Docket Nos. 14895, 15233, 15971, 2 F.C.C.2d 725 (1966).

Two Commissioners dissented from the promulgation of these rules adhering to the prior decision that the Commission had no statutory authority or jurisdiction over CATV, *Second Report and Order,* 2 F.C.C.2d at 808 and 819.

3. CATV in Bellingham, Washington

In 1951 there was no local television station in Bellingham, Washington. In order to meet the need and demand for local television, the Bellingham CATV system was franchised and licensed, and began operation in 1951 (R. p. 33). It has been in continuous, dependable service since that date. In addition to Bellingham, Telecable operates CATV systems in the neighboring Washington communities of Anacortes, Burlington, Mount Vernon and Sedro Woolley. Service began in Anacortes in 1963, in Burlington in 1956, in Mount Vernon in 1963, and in Sedro Woolley in 1956.

The principal service of Telecable is to make possible the reception of television signals from four (4) television stations in Seattle, Washington and one or two stations in Tacoma, Washington [8] (R. p. 34). Each system is equipped with a 12-channel capacity, and receives the signals of each television station carried without the assistance of microwave relay (R. p. 33).

The Bellingham system also carries local station KVOS-TV, which is classified as a Bellingham, Washington-Vancouver, British Columbia station. KVOS has requested non-duplication

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[8] One Tacoma station is carried in Bellingham and two Tacoma stations are carried in the remaining four communities.

protection on all of Telecable's CATV systems (R. p. 39). KVOS-TV derives an overwhelming portion of its revenues from the Vancouver, British Columbia area, based upon its substantial circulation in that Canadian city, rather than the domestic Bellingham, Washington area (R. p. 4). KVOS, established two years after the Bellingham CATV system, has shown a steady growth in earnings and revenue despite CATV competition.

Petitioner is not a licensee or applicant for license before the F.C.C. Its operations in Bellingham pre-date by fifteen years any F.C.C. regulations pertaining to the conduct of a CATV business, and its operations have never been the subject of any F.C.C. hearings or findings (R. pp. 51, 121-122).

The cultural, economic and commercial interests of the residents of Bellingham and its environs are principally directed south to Seattle as opposed to Canadian cities to the north. In recognition of this fact, and to meet local needs and interests, Telecable has been able to sustain its market by bringing Seattle stations to its serviced communities. In addition, it has conducted extensive community program origination on its CATV systems. With expanded service and programming, the Bellingham CATV system has met with continued local support and growth to its present level of approximately 6,000 subscribers (R. p. 1).

A curtailment of full-time Seattle services maintained for over fifteen years will constitute a disruption in the normal economic interests and development of northern Washington. The non-duplication order will result in the elimination of two channels carrying Seattle stations and will serve to decrease substantially the value of the cable television services rendered by Telecable and an expected decline

in subscription and revenue as a direct result from the diminuation of promised services (R. p. 7).

4. The Proceedings Before the F.C.C.

Petitioner, Total Telecable, Inc., is neither a licensee nor an applicant for a license before the F.C.C. Its business operations under local franchises pre-date the Commission's CATV rules by fifteen years.

On June 17, 1966, two months after the effective date of the new rules, Telecable filed with the Commission a petition for a waiver of Section 74.1103 of the Commission's newly promulgated rules and generally challenging the validity of these rules. By order of April 4, 1967, the Commission, without hearing or findings on the substantial factual issues raised, summarily denied the petition for waiver and, further, issued an order for petitioner to comply with Rule 74.1103(e) within thirty days. (7 F.C.C.2d 611 (1967)). Petition for reconsideration and application for stay were likewise denied. (8 F.C.C.2d 997 (1967)). The entire record of this appeal is contained in the pleadings and orders of the Commission. No evidence was taken, as indeed, no hearing was allowed.

SPECIFICATION OF ERRORS

1. The Commission erred in usurping jurisdiction over CATV, contrary to its controlling statute and in conflict with its prior administrative rulings, recognized by the courts and approved by Congress.

2. The Commission erred in the issuance of the CATV Regulations, restricting and limiting the activities of non-licensees engaged in the reception and distribution of television signals.

3. The Commission erred in promulgating the non-duplication rule, Section 74.1103, and in the issuance of a summary order restricting the reception and distribution of information, as a prior restraint in the exercise of free speech in violation of the First Amendment.

4. The Commission erred in the issuance of a summary order without hearing to a non-licensee, threatening its sixteen-year business, and a taking of property in violation of the Due Process clause of the Fifth Amendment.

5. The Commission erred in failing to provide for an evidentiary hearing as required by the Communications Act and the Administrative Procedure Act.

ARGUMENT

I.

THE FEDERAL COMMUNICATIONS COMMISSION LACKS STATUTORY AUTHORITY TO REGULATE PETITIONER' CATV BUSINESS

A. The Communications Act Does Not Provide For Regulation Of Non-Licensee Community Antenna Television Systems, Engaged In The Reception And Distribution of Television Signals.

An analysis of the Communications Act of 1934 demonstrates that there is no statutory authority for the regulation

and control by the F.C.C. of community antenna systems, which are admittedly not licensees or applicants for licenses before the Commission. The F.C.C. derives its powers and authority from its creating statute, the Communications Act of 1934, as amended, 47 U.S.C. 151 *et. seq.,* and the Act likewise limits and controls the extent of its jurisdiction and power. *Regents of Georgia v. Carroll,* 338 U.S. 586 (1950).

After its repeated disclaimers of jurisdiction over CATV and its unsuccessful attempts to gain a Congressional grant of jurisdiction, the Commission reversed its prior administrative interpretation and assumed jurisdiction over all CATV systems, *Second Report and Order (CATV),* 2 F.C.C. 2d 725 (1966). Conscious of its turnabout, the Commission took great pains to justify this newly discovered jurisdiction and attached to the *Second Report and Order* Appendix C, entitled "Commission's Memorandum on its Jurisdiction and Authority," 2 F.C.C. 2d at 793-797. This memorandum followed an apologia in the body of the report entitled, "A. Jurisdiction as a Matter of Law," 2 F.C.C. 2d at 728-733, which concluded with the assertion that "even if our past rulings in this troublesome area had been inconsistent, we are not estopped from correcting a ruling of law which appears to be clearly erroneous." 2 F.C.C. 2d at 733.

The Jurisdiction Memorandum pieces together a tenuous jurisdictional foundation from Sections 1, 4(i), 303(f), (h), (p), and (r), 307(b), 315, 317, and 508 of the Act, and of these the memorandum states "the crucial sections would appear to be 1, 307(b), 4(i), 303(f), (h), and (r)." 2 F.C.C. 2d at 794. An examination of these provisions and the legislative history of the Act do not support the Commission's conclusion that it has jurisdiction over CATV.

1. Title II (Common Carriers) And Title III (Radio) Of The Communications Act Are Mutually Exclusive, Providing Separate Schemes Of Regulatory Control, Neither Of Which Apply To Reception And Distribution By Cable.

The language of the Communications Act and its legislative history demonstrate that the F.C.C.'s power to regulate "wire communications" is restricted to its common carrier functions under Title II of the Act, 47 U.S.C. 201-222, and that its power to regulate "radio" is restricted to its licensing control under Title III, 47 U.S.C. 301-397. The two titles, born out of different acts and agencies, provide entirely distinct schemes of regulation. Title II, the "Common Carrier" part, regulates tariffs, rates and services of common carrier wire communications. Title III, the radio part, provides for licensing of radio and television stations and the allocation of frequencies and service areas to these stations. The Commission, in its usurpation of jurisdiction over CATV, has borrowed "wire communications" from the definitions applicable to the one service and applied it to the other. Wire communications are unique to common carrier service and have no application to radio. In attempting to place CATV under Title III regulatory powers, the Commission seeks to impose a new scheme of restrictive regulations, other than licensing as provided in Title III. The Act and its legislative history will not support this jurisdictional grab.

By enactment of the Communications Act of 1934, Congress placed under one agency unified control over all forms of electrical communications. The Act transferred to the newly created Federal Communications Commission the functions of the Interstate Commerce Commission regarding common carriers, and the functions of the Federal Radio

Commission regarding radio. The provisions of the I.C.C. Act pertaining to common carrier regulations became Title II of the Communications Act and the provisions of the Radio Act of 1927, 47 U.S.C. 81 *et. seq.,* became Title III of the Act. The Act did not create any new areas of federally regulated activity. Title I created the Commission and sets forth its purposes and definitions which cover its disparate functions contained in Title II and III.

If there is any authority or jurisdiction over CATV, it must come from either Title II or III since the other titles provide no independent substantive authority.[9] Of these two, Title II has no application, since the Commission has stated that CATV operations do not consitutute common carrier activities under the Act. *Philadelphia Television Broadcasting Co. v. F.C.C.,* 359 F 2d 282 (D.C. Cir. 1966).

In attempting to establish its tenuous jurisdiction under Title III, the Commission first relies upon the general purposes and definitions contained in Title I. Section 1, 47 U.S.C. 151, explains that the purposes of the Act are for "regulation of interstate and foreign commerce in communication by wire and radio," and Section 2(a), 47 U.S.C. 152(a), explains that the act applies to "all interstate and foreign communications by wire or radio and . . . transmission of energy by radio." Section 3(a) of the Communications Act, 47 U.S.C. 153(a), defines "wire communication" or "communication by wire" as the "transmission of writing, signs, signals, pictures, and sounds of all kinds by either wire, cable or other like connection between the points of origin and reception of such

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[9] Of the remaining three parts to the Act, Title IV pertains to procedural and administrative requirements; Title V, penalties for violations of the Act; and VI, miscellaneous housekeeping provisions.

transmission, including all instrumentalities, facilities, apparatus, and services . . . incidental to such transmission." The Commission argues that CATV, although not a common carrier, is "wire communication," and using the definition in 3(a) as a spring board, claims that it possesses Title III powers of regulation and rule making over CATV, as contained in Sections 4(i), 303(f), 303(h), and 307(b) of the Act. This rationale is false since: (1) Title I conveys no substantive rights but only defines terms used throughout the Act; (2) the definition of "wire communications" pertains only to Title II common carriers; (3) the legislative history indicates disparate functions over common carrier wire communication on the one hand and radio on the other, combined for convenience under one Act and with one set of definitions; and (4) Title III pertains essentially to licensing of radio transmission and not restriction of reception.

The Radio Act of 1927 contained a definition of "radio communication" in Section 31 (47 U.S.C. 111) which is essentially the same as Section 3(b) of the Communications Act. However, the Radio Act of 1927 contained no definition of "communication by wire" similar to Section 3(a) upon which the Commission now relies. Section 3(a) is derived from Section 1(3) of the Interstate Commerce Act (41 Stat. 475) which related only to activities of common carriers. Section 3(a) was incorporated into the Communications Act for the purpose of defining the applicability and impact of Title II powers which the F.C.C. took over from the I.C.C.

Title III conferred upon the F.C.C. the authority which the Federal Radio Commission had with respect to communication by radio and Title II conferred upon the F.C.C. functions which the I.C.C. had with respect to activities of common carriers. No crossover was intended and none was achieved. Moreover, the F.C.C. has never before claimed or

attempted to confuse these distinct functions. Prior to 1934, the Federal Radio Commission could not under the predecessor of Title III of the Communications Act adopt rules and regulations with respect to wire communication and, prior to 1934, the I.C.C. could not exercise Title III powers with respect to persons engaged in common carrier activities. Section 2 is simply a declaration of purpose that the authority of the Commission applies in appropriate cases to communication by wire and in other cases to communication by radio.

The intent of the Communications Act is underscored by its legislative history. The Senate Committee Report (Senate Report No. 781, 73d Congress) accompanying the legislation explains (p. 3) that Title II, for the most part, "follows the provisions of the Interstate Commerce Act now applicable to communications or adopts some provisions of that Act now applicable only to transportation." As to Title III, it states that it (p. 6):

> ". . . consists of the Radio Act of 1927 written to bring into a single title effective provisions of that Act and its several amendments. The language has been changed in minor respects to conform to the terms and definitions in the remainder of the bill."

The Conference Committee, in resolving differences between Senate and House bills, stated as to Title III (Conference Report on Communications Act of 1934, House Report No. 1918, 73d Cong., p. 47):

> "The Senate bill abolishes the Federal Radio Commission, and repeals the Radio Act of 1927, but in effect reenacts it in Title III, eliminating certain matters no longer effective, and adding certain provisions, most of which are taken from

> H.R. 7716, 72d Congress, which passed both houses but was pocket vetoed. Title III of the House bill abolishes the Federal Radio Commission but transfers its functions under the Radio Act of 1927 to the new Commission. Title III of the substitute adopts the provisions of the Senate bill, except that most of the changes from existing laws which were not contained in H.R. 7716 have been omitted."

When Congress enacted the Communications Act it manifestly intended the F.C.C. to perform under Title II of the Act those functions which were formerly performed by the I.C.C. under its Act and its Title III functions were to be those which had been performed by the Federal Radio Commission under the Radio Act of 1927. Nowhere in the legislative history is it indicated that the F.C.C. granted Title III functions over communication by wire. The Commission's reliance on Section 3(a) for assertion of Title III powers over CATV is therefore without foundation. Had the Congress intended that Title III would apply equally to wire or cable communication, it could have easily manifested such an intent by including these words in Title III, or by amending the definition of "broadcasting" in Section 3(a) to include wire communication. It did not choose to do so and the two parts are mutually exclusive in posing different regulatory schemes to different regulatory problems. CATV is not included in either scheme.

2. Title III Pertains To Radio Transmission, Rather Than Reception And Distribution By Cable, And Establishes A System Of Licensing Regulation.

The method of regulation under Title III of the Act chosen by Congress is *licensing*. The Supreme Court

specifically noted this restriction in *Regents of the University of Georgia v. Carroll,* 338 U. S. 586 (1950):

> "As an administrative body, the Commission must find its powers within the compass of the authority given it by Congress. . . . [T]hese cases ... make clear that *the Commission's regulatory powers center around the grant of licenses.* They contain no reference to any sanctions, other than refusal or revocation of a license, that the Commission may apply to enforce its decisions." (338 U.S. at 597-99) (Emphasis added.)

In *Southwestern Cable Co. v. United States,* 378 F 2d 118 (9th Cir. 1967), this Court examined the basis for the Commission's newly asserted jurisdiction over CATV in the issuance of cease and desist orders against CATV operators. The Commission cited as its jurisdictional authority to issue such orders, Sections 4(i) and 303(r) of the Act, 47 U.S.C. 154(i) and 303(r), sections also asserted here as a basis for jurisdiction. After a careful analysis of these sections, Judge Barnes explained that the "method of regulation of *broadcasting* chosen by Congress was licensing." Since petitioner here, as in *Southwestern,* is a CATV operator, and as such neither a licensee nor applicant for license, petitioner is beyond the ambit of the Commission's licensing authority and control. The Commission's attempts to regulate, or more accurately restrict and inhibit, CATV other than by its licensing procedure are invalid. Since CATV systems seek no radio frequencies in their operations and are not before the Commission for license application, modification, or renewal, the Commission is without jurisdiction or authority to regulate them.

The limitation of the Commission's authority to licensing regulation was also recognized by the Supreme Court in *FCC v. American Broadcasting Co.*, 347 U.S. 284 (1954), which dealt with the network "giveaway" programs of a few years ago. That case dealt with the Commission's power to license and its relationship between sanctions under the Criminal Code against broadcasting lottery information. (18 U.S.C. 1304)

> "Like the Court below, we have no doubt that the Commission concurrently with the Department of Justice, has power to enforce Section 1304. Indeed, the Commission would be remiss in its duties if it failed, *in the exercise of its licensing authority*, to aid in implementing the statute, either by general rule or by individual decisions. Both the Commission's power in this respect is limited by the scope of the statute. Unless the 'give-away' programs involved here are illegal under Section 1304, the Commission cannot employ the statute to make them so by agency action." (Emphasis added). (347 U.S. at 289-290).

CATV operation is a reception service and not a transmission service. The whole thrust of the Radio Act of 1927 and Title III of the Communications Act of 1934 was to confer on the Federal Radio Commission and the FCC authority over transmission, but not over reception. Section 301 of the Communications Act, 47 U.S.C. 301, defining the scope of Title III of the Communications Act, makes this abundantly clear when it states:

> "It is the purpose of this Act, among other things, to maintain the control of the United States over all channels of interstate and foreign *radio transmission;* and to provide for the use of such channels, but not the ownership thereof, by persons

> for limited periods of time, under licenses granted by Federal authority. . . ." (Emphasis added.)

In 1927 existing legislation was inadequate to prevent the Secretary of Commerce from denying licenses to qualified applicants merely because interference would be caused to other stations or to permit the Secretary to confine a licensee to the frequency originally assigned. *National Broadcasting Co. v. United States,* 319 U.S. 190, 210-13 (1943). The inevitable result was chaos in the spectrum. The Radio Act of 1927 was passed to relieve this chaos by creating adequate authority over radio transmission. This is the authority which was granted to the Federal Radio Commission by the Radio Act of 1927 and this was the authority which Title III of the Communications Act gave to the FCC.

There is nothing in any of the specific statutory provisions cited by the Commission as the basis for its authority which indicates that the Commission's Title III authority extended to anything but regulation of transmission. Sections 4(i) and 303(r) give the Commission broad rule making authority to carry out the provisions of the Act. But by themselves they confer no independent power; they are dependent upon other substantive provisions.

Section 303(f) authorizes the Commission to promulgate rules and regulations designed to prevent interference among stations. This section clearly relates to transmission alone. There is nothing whatsoever in the activities of CATV that directly or indirectly causes any interference among stations and the CATV rules do not relate to transmission interference. Section 303(h) authorizes the Commission to establish areas or zones to be served by stations. Again, the subject matter is clearly transmission.

The last "crucial" section relied upon by the Commission is Section 307(b). This section provides:

> "In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."

By its terms this section is limited to transmission and its method of regulation is by license, whether it be applications for licenses, modifications, or renewals. Section 307(b) provides that when conflicting demands exist for frequencies, the Commission is to make an equitable allocation.

The legislative history of Title III confirms the Congressional purpose in conferring power only over transmission. These sections came to Title III from the Radio Act of 1927. In the debate on the House floor on H.R. 9971, (a later version of H.R. 5589), Congressman White of Maine, who introduced both H. R. 5589 and H. R. 9971, cast further light on Congressional purpose (67 Cong. Rec. 5479):

> "Existing law gives the Secretary no control over the location of stations. The result has been an unjustifiable grouping of stations within limited areas. * * * Stations so centered detract from the value of each other and interfere with the highest quality of service. In the bill before you the Secretary is given authority in passing upon a license to consider its proposed location and the area to be served thereby, and he is enjoined to effect an equitable

> geographic distribution of stations over the entire country."

Both as a matter of construction of the words of the statute and a study of the legislative history, Congress intended to restrict Commission authority under Title III to regulation of transmission, not reception.

In the recent opinion of the United States Court of Appeals for the District of Columbia Circuit in *Buckeye Cablevision, Co. v. FCC*, ____ F. 2d ____ (District of Columbia Circuit No. 20274, decided June 30, 1967) the court, apparently troubled by the Commission's assertion that its regulatory scheme would suffer by unregulated CATV, essentially relied on Section 307(b) to *extend* the Commission's statutory jurisdiction to cover CATV systems. "[*Carroll*] does not bar Commission authority to regulate a form of wire communication which enlarges the signal range of licensee stations to the potential detriment of the regulatory scheme." *Buckeye, supra,* at 7. The court disregarded the *Carroll* holding and failed to analyze or discuss the significant statutory and constitutional questions raised by the Commission's action. Since the question is not what the Commission's authority *should* be but what it *is* under the statutory *licensing* approach taken by the Congress, the *Buckeye* holding (which related only to the application of Section 74.1107 of the Rules) is in error and should not be followed by this Court.

The inconsistency of the Commission's present position and the over-reaching nature of its CATV jurisdictional grab is perhaps best illustrated by its conduct in 1962 in connection with the All-Channel Receiver Law. In 1962, the Commission sought and received Congressional legislation designed to allow the Commission to require UHF reception capability for all commercial television receivers. (47 U.S.C. 303(s), 330

(1962), H. Rep. No. 1559, S. Rep. No. 1525, 87th Cong., 2d Sess. (1962).)

The Commission recognized that its authority over reception devices was inadequate, and in requesting the All-Channel Receiver Law, it candidly stated to the Congress (Hearings on H.R. 8031 before the House Committee on Interstate and Foreign Commerce, 87th Cong., pp. 7-8 (1962)):

> "In the Communications Act of 1934, Congress vested the Federal Communications Commission with the responsibility of making available to all people of the United States, an efficient and nation-wide communications service, and certain authority to carry out these responsibilities. Our request for this legislation is an expression of our feeling that in the area of television reception systems, our present authority is not commensurate with our responsibilities . . . ."

The Congress obviously agreed with the Commission as to lack of authority over reception for it proceeded to enact the All-Channel Receiver Law, which added to the Communications Act the only reference or application to radio reception.

There would appear to be no clear or significant distinction between such limitation on the use of individual *receiving* sets and the present attempted foreclosure or limitation on the use of various CATV receiving apparatus, the former of which the Commission felt in 1962 required an amendment to the act since its "present authority" "was not commensurate with its responsibilities".

The Commission was obviously right in 1962 in asking Congress for a specific grant of authority to deal with the

subject of reception. It's claim now under Title III of the Communications Act to deal with the subject of CATV is an outright usurpation of authority.

B. An Administrative Ruling Recognized by the Courts and Acquiesed to by Congress Has the Force of Law and Cannot be Overturned by the Agency

It is a well settled principle of statutory construction that a prior and consistent administrative interpretation is given great weight by the courts, *Norwegian Nitrogen Products Co. v. United States,* 288 U.S. 294, 313-315 (1933). Even greater weight is given to the administrative interpretation when Congress becomes aware and acquiesces to the construction of the statute as interpreted by the administrative agency. *United States v. Leslie Salt Co.,* 350 U.S. 383, 396-397 (1956), affirming the decision of this Court, 218 F. 2d 91 (9th Cir. 1954).

The conclusiveness of the original administrative interpretation is strengthened where the question is the scope and power of the agency to issue legislative rules, *United States v. American Trucking Association,* 310 U.S. 534, 549 (1940). It is likewise strengthened where the courts have recognized the prior administrative interpretation, *Corn Products Refining Co. v. Commissioner of Internal Revenue,* 350 U.S. 46, 53 (1955); *NLRB v. Gullett Gin Co.,* 340 U.S. 361, 365-366 (1951). But where the Congress is deemed to have approved the longstanding administrative interpretation by not amending or by re-enactment of the statute, the interpretation has the force and effect of law. *Helvering v. Winmill,* 305 U.S. 79, 83 (1938), cited with approval in *Fribourg Navigation Co. v. Commissioner of Internal Revenue,* 383 U.S. 272 at 283-284 (1966); *J. G. Boswell Company v. Commissioner of Internal Revenue,* 302 F. 2d 682, 685 (9th Cir. 1962) *cert.*

denied 371 U.S. 860 (1962).

CATV operation began in the early 1950s. The first FCC action relating to CATV was in 1956 and concerned the limits of cable radiation of energy by CATV systems. *In re Incidental and Restricted Radiation Devices, Third Report and Order,* Docket No. 9288, 21 Fed. Reg. 5366, 13 Pike and Fischer R.R. 156a (1956). In 1959, after a two-year investigation of "auxiliary" services of television broadcasting, the Commission issued a report and order absolutely disclaiming any jurisdiction over CATV under the Communications Act of 1934, *In re Notice of Inquiry into the Impact of Community Antenna Systems, TV Translators, TV "Satellite" Stations and TV "Repeaters" on the Orderly Development of Television Broadcasting, Report and Order,* Docket No. 12443, 26 F.C.C. 403 (1959). The Commission's exhaustive examination of jurisdiction concluded that it did not have plenary power to regulate CATV under the Communications Act.

Since 1958, the FCC had frequently and consistently held that it did not have regulatory jurisdiction over the operation of community antenna television systems.[10] *Frontier Broadcasting Co. v. Collier,* 24 FCC 251, 16 Pike and Fischer R.R. 1005 (1958); *CATV and TV Repeater Services,* 26 FCC 403, 18 Pike and Fischer R.R. 1573 (1959); *WSTV, Inc. v. Fortnightly Corp.,* 23 Pike and Fischer R.R. 184 (1962). This determination of a want of jurisdiction was based principally upon recognition of the distinguishing fact that the community television master-antenna activity is a *reception* function utilizing closed circuit wirelines, as opposed to a jurisdictional broadcasting or "radio" activity, and thus fell without the scope of the Communications Act.

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[10] For a legislative history of the Commission's unsuccessful attempts to get a jurisdiction grant from the Congress over CATV see Appendix A, *infra,* p. 1a.

The Commission's administrative interpretation that it lacked jurisdiction over CATV systems was judicially noticed in *Cable Vision, Inc. v. KUTV, Inc.*, 211 F. Supp. 47 (D. Idaho, 1962), reversed on other grounds, 335 F. 2d 348 (9th Cir. 1964). The court stated:

> " As indicated in this Court's previous discussion of history of this so-called consent provision, community antenna services are not 'broadcasters' within the meaning of the definition of 'broadcasting' as presently stated in the Federal Communications Act. (FCA, 47 USC 153(a)). The Congress has consistently refused to adopt amendments necessary to make that provision applicable to community antenna services . . . .
>
> So it is that under present national policy, community antenna services remain a permissible and as yet unregulated means of television reception. Accordingly, the Federal Communications Commission has held that it does not have jurisdiction over community antenna services." (211 F. Supp. at 55.)

The FCC, acknowledging its lack of jurisdiction, formally determined, however, that legislation conferring it with certain limited authority over community antennas would be advisable; and, accordingly, the agency's want of jurisdiction was first brought to the attention of the 86th Congress along with certain legislative recommendations of the Commission, 105 Cong. Rec. 6753 (1959).

Lengthy hearings through the summer and fall of 1959 were held by a subcommittee of the Senate Committee on Interstate and Foreign Commerce on the legislation proposed by the FCC. *Hearings before the Communications Sub-Committee of the Committee on Interstate and Foreign Commerce, United States Senate, 86th Cong. 1st Sess. (1959), of VHF*

Booster and Community Antenna Legislation. The full Senate Interstate and Foreign Commerce Committee then favorably reported a bill granting the Commission jurisdiction to regulate community antenna systems in certain particularized circumstances, S. Rep. No. 923, 86th Cong., 1st Sess. (1959) accompanying Senate Bill 2653 entitled "A bill to amend the Communications Act of 1934 to establish jurisdiction in the Federal Communications Commission over community antenna systems." In 1960, after several days of debate, the Senate recommitted the bill and no legislation authorizing FCC regulation of community antenna systems was enacted by the 86th Congress. 106 Cong. Rec. 10520, 10547 (1960).[11] Again, in 1961, the FCC submitted to the 87th Congress proposed legislation giving it jurisdiction to regulate community antenna systems. 107 Cong. Rec. 2523 (1961); S. 1044 and H.R. 6864, 87th Cong., 1st Sess. (1961). The 87th Congress similarly failed to enact any legislation conferring the Commission with jurisdiction over the community antenna industry.

Following these unsuccessful attempts to attain Congressional grant of jurisdiction, the Commission in a series of proceedings culminating in the *Second Report and Order,* 2 FCC 2nd 725 (1966) reversed its prior rulings and assumed regulatory control over CATV systems under its rule-making procedures. Thus, the Commission upset and reversed its prior holdings that it had no jurisdiction over CATV, which was then in its fifteenth year of operational history.

Perhaps uncertain of this bold usurpation of jurisdiction, the Commission again appealed to Congress for statutory authority conferring jurisdiction upon it over CATV systems, House Report 1635, 89th Congress, 2nd Sess., submitted June 17, 1966 to accompany H.R. 13286. This bill failed to pass the Congress as did the prior attempts. No doubt

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[11] Appendix A, *infra*, pp. 1a-16a.

persuasive in this decision was the very strong minority report which stated:

> "H.R. 13286 is a bill that was prepared by the Federal Communications Commission and forwarded to the Congress with the request that it be passed. It is not an administration bill. It is an attempt by a federal agency to force Congress to give it jurisdiction which it heretofore claimed it did not have. The passage of this bill at this time was served to underwrite an unauthorized assumption of jurisdiction by the Federal Communications Commission; . . . it would create an entirely new concept of regulation at federal level; it would violate the Constitutional guarantees of the First Amendment; it would permit a federal administrative agency (supposedly an arm of Congress, created by the Congress) to write substantive law by the exercise of rule-making powers; . . . ." [12]

By its assumption of jurisdiction, the Federal Communications Commission has erroneously attempted to reverse its prior decisions which, by court recognition and Congressional approval, had assumed the force and effect of law.

The Supreme Court has rarely departed from its doctrine of longstanding administrative interpretation. In *Baltimore and Ohio Railway Company v. Jackson,* 353 U.S. 325, 330-331 (1957), the question was whether or not the administrative agency did in fact decide the matter. By a five to four decision, the Court held that there had been no express administrative determination of the problem. "We believe petitioner overspeaks in elevating negative action to positive

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[12] For a fuller statement see Appendix A, *infra,* pp. 27a-34a.

administrative decision." Here, there can be no doubt that the FCC made a definitive ruling that it lacked jurisdiction over CATV.

Other attempts to depart from this doctrine have been based upon the argument that the Congress did not clearly acquiesce or approve the administrative ruling. In *Cammarano v. United States,* 358 U.S. 498, 510-511 (1959) the Court stated that it was not considering "a case where no reliable inference as to Congress' intent can be drawn from reenactment of a statute because of a conflict between administrative and judicial interpretation of the statute at the time of its reenactment." Here too, the FCC when it presented to Congress a proposed amendment which was rejected, there had been no prior conflicts in its own decisions nor any contrary interpretations by the courts. [13]

In *Fribourg Navigation Co. v. Commissioner of Internal Revenue,* 383 U.S. 272, 283-284 (1966), the Supreme Court rejected the argument that there was no approval since Congress had failed to focus on the issue. The Court explained: "The legislative history in this area makes it abundantly clear that Congress was cognizant of the revenue possibilities in sales above depreciated cost." Here too, there can be no doubt from the legislative history, the debate, and even the title of the bill – "a bill to amend the Communications Act of 1934 to establish jurisdiction in the Federal Communications Commission over community antenna systems" – that Congress did focus on the issue in rejecting the proposed amendment.

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[13] Since defeat of the jurisdictional amendment in the Congress, the D. C. Circuit handed down its sweeping decision in *Buckeye Cablevision Co. v. FCC,* ___ F. 2d ___ (D.C. Circuit, No. 20,274, decided June 30, 1967.

The issue here involved is a very important one involving the statutory jurisdiction of a regulatory body created by Congress and performing rule-making functions designated to it by the Congress. Its jurisdiction and purposes are set out in its controlling statute with great specificity. It has usurped jurisdiction, which it consistently and definitively held it did not possess, and which the Congress repeatedly failed to grant after a number of attempts. The Commission's prior administrative interpretation that it did not possess jurisdiction, recognized by the courts and acquiesed to and approved by the Congress in its consideration of the proposal to amend the Act by conferring jurisdiction, has the force and effect of law and cannot be overturned by a subsequent ruling by the Commission. The only way in which the Commission can gain jurisdiction in this area is by a clear delegation of that jurisdiction from the Congress in an amendment to the act, which the Congress in its wisdom has heretofore not seen fit to do. Neither the Commission nor the courts can confer this jurisdiction and change the prior administrative interpretation which has acquired the force and effect of law.

II.

THE COMMISSION'S CATV RULES ARE IN VIOLATION OF THE FIRST AND FIFTH AMENDMENTS OF THE CONSTITUTION

A. The Non-Duplication Rule Restricting the Reception and Distribution of Television Signals is in Violation of the First Amendment

The Commission's non-duplication rule, Section 74.1103, and its summary order against petitioner are a prior restraint in the reception and distribution of information and tread upon free speech guarantees of the First Amendment. The

non-duplication rule provides in part that the CATV system, upon request of the local television station, will black-out same-day imported signals which duplicate local signals.

"The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute [and] the right to receive . . ." *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965). Communication by any lawful means—motion picture, radio, television, newspaper, closed-circuit, hand-bill, the mails, etc.—falls within the constitutional protections provided by the First Amendment. *ABC v. United States*, 110 F. Supp. 374 (SDNY, 1953), aff'd *sub nom. FCC v. ABC*, 347 U.S. 284 (1954); *Weaver v. Jordan*, 64 Cal. 2d 235, 411 P. 2d 289 (1966), *cert. denied*, 385 U.S. 844 (1966).

The entire stream of communications from source to destination is constitutionally protected. This fundamental constitutional principle embraces not only the right of publication but also the rights of dissemination and distribution, as well as of reception. *Saia v. New York*, 334 U.S. 558 (1948); *Winters v. New York*, 333 U.S. 507 (1948); *Martin v. Struthers*, 319 U.S. 141 (1943). Circulation is equally protected. "Liberty of circulating is as essential to that freedom [freedom of press and speech] as liberty of publishing; indeed, without the circulation, the publication would be of little value." *Ex Parte Jackson*, 96 U.S. 727, 733 (1877); *Lovell v. City of Griffin*, 303 U.S. 444 (1938).

Once established that the communication or medium is constitutionally protected, the government shall impose no prior restraints or condition upon the free exercise of a benefit or privilege if the effect thereof is to "inhibit or deter the exercise of First Amendment freedoms". *Sherbert v. Verner*, 374 U.S. 398, 404-5 (1963); and see *LaMont v. Postmaster*

General, 381 U.S. 301 (1965).

The primary purpose of the First Amendment, as it relates to speech and press, is to suppress prior restraints upon publication, circulation or distribution. *Joseph Burstyn, Inc. v. Wilson,* 343 U.S. 495 (1952). With "respect to the vital importance of protecting this essential liberty from every sort of infringement" *(Lovell v. City of Griffin, supra,* at p. 452), see *Near v. Minnesota,* 238 U.S. 697; *Grossjean v. American Press Company,* 297 U.S. 233; *DeJonge v. Oregon,* 299 U.S. 353. "Freedoms [guaranteed by the First Amendment] . . . are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." *Bates v. City of Little Rock,* 361 U.S. 516, 523 (1960).

Particularly objectionable is the practice of censorship exercised through the vehicle of licensing authority. "The struggle for the freedom of the press was primarily directly against the power of the licensor." *Lovell v. City of Griffin, supra,* at p. 451. See also the Chief Justice's dissent in *Times Film Corporation v. Chicago,* 365 U.S. 43 (1961). Indeed, any "intimidation" by the government upon *distribution* of constitutionally protected material, no matter what the purpose, is hostile to the mandate contained in the First Amendment and must be terminated forthwith. *Bantam Books v. Sullivan,* 372 U.S. 58, 70 (1963).

In the field of radio and television communications the only permissible restraint has been related to the physical limitation of available frequencies in the spectrum. In *NBC v. United States,* 319 U.S. 190 (1943), the Supreme Court held that because of limitation of available frequencies reasonable regulation under the licensing standard of public convenience and necessity is neither a violation of the First Amendment nor is it censorship within the meaning of Section 326 of the Communications Act, 47 U.S.C. 326. In another radio licensing

case, *Lafayette Radio Electronics Corp. v. FCC*, 345 F. 2d 278 (2d Cir., 1965), the court there upheld the Commission's restrictions on the permissible nature of radio transmissions using the Citizen's Band Radio Service because of natural limitations in available frequencies.

Carter Mountain Transmission Corp. v. FCC, 321 F. 2d 359 (D.C. Cir., 1963), *cert. denied*, 375 U.S. 951 (1963), upheld denial of a radio license to a common carrier which wished to transmit TV signals to a CATV system. The court there side-stepped the First Amendment question and held that this was a "licensing" procedure and not regulation of CATV. Moreover, the court pointed out that the CATV system was not a party to the case and neither its rights nor those of its subscribers were before the court. See also *Idaho Microwave, Inc. v. FCC*, 352 F. 2d 729 (D.C. Cir., 1965) where the CATV system was before the court as intervenor in the licensing of radio microwave transmission to a CATV system. There the court met First Amendment objections by explaining that it was concerned with "licensing" of microwave radio and not regulation of CATV or its right to receive and distribute.

These cases all involved the administrative function of licensing and all predate the *Second Report and Order* which is specifically designed to regulate CATV's right to receive and distribute. Constitutional issues were raised before the Commission in the promulgation of the CATV rules and ignored in the majority ruling, *Second Report and Order*, 2 F.C.C. 2d 725 at 729-734 and 793-797. In the CATV Rules no licensing is involved, and no reasonable regulation over limited frequency space is involved.

"Congress has from the first emphatically forbidden the [Federal Communications] Commission to exercise any power of censorship over radio communications." *Farmer's Union v. WDAY*, 360 U.S. 525, 529 (1958). Section 326 of the

Communications Act (47 U.S.C. 326), which *limits* the jurisdiction and authority of the administrative agency, reads in full as follows:

> "Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."

Without equivocation therefore the Congress has prescribed that the FCC shall promulgate no regulation or *condition* which may be understood, construed or used to infringe upon or interfere with the right of free speech, nor shall the Commission be empowered to take any action constituting censorship over radio communications or over "*signals transmitted by any radio station*".

Here the Commission is repressing maximum distribution of communications made possible by technical advances. Petitioner has sought to demonstrate that its operation and distribution are not harmful to local television. Under these circumstances there is no reasonable protection of the public interest which warrants a restriction on petitioner's First Amendment rights to freely distribute available television signals. Accordingly, the Commission's non-duplication rule and its proscriptive order halting a substantial part of petitioner's distribution without reference to any reasonable public interest is an unlawful restriction of the freedom of speech and in violation of the First Amendment.

B. The Issuance of a Summary Order by an Administrative Agency Threatening Property Rights is a Denial of Due Process in Violation of the Fifth Amendment

The denial of a hearing in the issuance of a proscriptive order halting a substantial part of petitioner's business is a deprivation of property without due process of law in violation of the Fifth Amendment. The due process concept was explained in *Hannah v. Larche*, 363 U.S. 420 at 442 (1960):

> " 'Due process' is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts. Thus, when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process."

In *CAB v. Delta Air Lines*, 367 U.S. 316, 330 (1961) the Supreme Court reversed a Board decision modifying a certificate of convenience without hearing. The Court based its decision on the statutory language of the act, but suggested that the condemned action had due process implications, citing *Seatrain Lines v. United States*, 64 F. Supp. 156 at 161 (D. Dela. 1946), affirmed 329 U.S. 424 (1947). *Seatrain* held that the I.C.C. could not alter or cancel an original certificate given to a water carrier. The lower court had held the Commission's order would deprive Seatrain of property without due process of law in violation of the Fifth Amendment, 64 F. Supp. 156 at 161. In affirming, the Supreme Court noted that *Seatrain* had been conferred "grandfather" rights, as here, and in reliance had expended large sums in its business, which the order would have threatened.

In *Superior Oil Company v. F.P.C.*, 322 F.2d 601 (9th Cir. 1963), *cert. denied*, 377 U.S. 922 (1964), this Court examined due process issues concerning a denial of hearing in an administrative proceeding. The Court observed that in *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956) the due process issue was not raised, but that due process required governmental agencies in adjudications to observe the traditional judicial processes, citing *Hannah v. Larche*, 363 U.S. 420 at 442 (1960).

More recently in *Southwestern Cable Co. v. United States*, 378 F.2d 118 (9th Cir. 1967), Judge Ely in the concurring opinion reasoned that the petitioner had relied upon the Commission's previous disavowal of jurisdiction over CATV in investing substantial sums of money. The Commission's proscriptive order, if enforced, would adversely affect, if not destroy, the petitioner's investments. In light of this, Judge Ely stated that "the Commission trespassed upon constitutional safeguards against the confiscation of property."

Here, the Commission's order is not merely a freeze or a maintenance of the *status quo* as it was in *Southwestern*, but it means a substantial cutting back of petitioner's existing business. Clearly, this is a taking of property without compensation and without due process of law in violation of the Fifth Amendment.

Standard Airlines, Inc. v. Civil Aeronautics Board, 177 F.2d 18 (D.C. Cir. 1949) held that a regulatory agency could not create a special class of irregular carrier by granting "letters of registration" with the right to revoke it at any time rather than a certificate of public convenience, in an attempt to circumvent a hearing on revocation or alteration of rights.

The Court explained:

> "The controlling practicality, in our view, is that the suspension would destroy property, not a license property but investment and business property. The Government cannot make a business dependent upon a permit and make an otherwise unconstitutional requirement a condition to the permit." (177 F.2d at 20.)

Here the same device has been employed against the petitioner and other CATV operators. The Commission has assumed special regulatory control over CATV business, and altering and threatening by proscriptive order petitioner's business without permitting the elementary safeguards of due process as provided by the Fifth Amendment.

Gonzalez v. Freeman, 334 F.2d 570 (D.C. Cir. 1964), dealt with due process aspects in summary suspension of the privilege of contracting with the government. In reversing the agency's action, the court explained that there was no right to contract with the government, but that the suspension of the privilege involved severe *economic injury*. Such circumstances called for application of basic principles of fairness and *due process*. In applying these principles, the court offered these guidelines: How was the individual to be hurt? What governmental interest was to be protected? How would the governmental interest be affected, if at all, by extending procedural safeguards to cover the challenged action?

Here, the Commission in its summary action and conclusionary findings in support of its proscriptive order, has demonstrated a callous disregard of fair play and due process. In its denial of hearing it has barred consideration of the harm likely to be suffered. It has stuck steadfastly to its general conclusions favoring television by eliminating competition,

whether or not the competition has any decided impact on the preferred television, and it has ignored the factor of fair play in the issuance of its summary action. Previous application for stay pending reconsideration was summarily denied by the Commission. (R. p. 139) 8 F.C.C. 2d 388. The Commission action has trod upon the property and investments of petitioner's sixteen-year business, most of which was incurred in the period the Commission steadfastly maintained it had no jurisdiction over petitioner's CATV system. Now the Commission will not even listen to petitioner's grievances as it operates to curtail and threaten petitioner's business. Such rules and action are in violation of due process guarantees of the Fifth Amendment.

III.

FAILURE TO PROVIDE FOR AN EVIDENTIARY HEARING IN MODIFYING PETITIONER'S BUSINESS IS IN VIOLATION OF PERTINENT STATUTES AND REGULATIONS

The Federal Communications Commission does not purport to license CATV, but it assumes a greater restrictive and discriminatory control over CATV than exercised over any other communications medium. After its original disclaimer of jurisdiction in 1959 and its failure to gain Congressional grant of jurisdiction over CATV in 1959 and again in 1961, the Commission assumed jurisdiction over CATV in 1966 insofar as CATV affects local television. These rules are admittedly protective of the preferred television broadcast station, restrictive of free competition, and deny minimum safeguards of a fair hearing as required by the Administrative Procedure Act, the Communications Act of 1934, and the Commission's own rules for licensing, and as guaranteed

to all other communications media over which the Commission exercises regulatory control.

A. Existing Statutes and Regulations Require a Hearing Prior to Modification or Revocation of an Existing Business

The conduct and requirements for adjudication and rule making by government agencies are subject to the provisions of the Administrative Procedure Act, 5 U.S.C. 551 *et seq.* The Act provides that "adjudication" shall be determined on the record after opportunity for agency hearing (5 U.S.C. 554). General conduct and procedure of the hearing, including an impartial hearing examiner, the submission of evidence, right to subpeona witnesses, presentation of documentary evidence, transcript of record, preparation of findings and decisions, are set forth in Sections 7 and 8 of the APA, 5 U.S.C. 556 and 557.

The Communications Act of 1934, 47 U.S.C. 151 *et seq.*, contains similar safeguards for administrative hearings affecting the rights of parties. Initially the Act provides for a full evidentiary hearing upon any application for license where there exists a substantial and material issue of fact, 47 U.S.C. 309(e). Concerning the rights of existing licensees, the Act specifies that the Commission in suspending a license, shall conduct a full administrative hearing, 47 U.S.C. 303(m)(2). Before revoking a license or permit, the Commission must serve a show cause order and allow a party a full hearing, where the burden of proof is upon the Commission, 47 U.S.C. 312(c) and (d). Moreover, even a modification of license or construction permit entitles a party to full evidentiary hearing with the burden of proof placed upon the Commission, 47 U.S.C. 316. See *Civil Aeronautics Board v. Delta Air Lines*, 367 U.S. 316 (1961), concerning a

modification of a certificate of convenience in violation of Section 401(g) of the Federal Aviation Act of 1958, 49 U.S.C. 1371(g).

In implementing the Communications Act and the requirements of the Administrative Procedure Act, the Commission's rules similarly provide for hearing: on the suspension of an operator license, 47 C.F.R. 1.85; on the modification of a radio license, 47 C.F.R. 1.87; and on revocation or in cease and desist proceedings, 47 C.F.R 1.91. Without such minimum and traditional safeguards, individuals have no protection against arbitrary, capricious, or erroneous rulings and orders by quasi-judicial and administrative agencies.

Turning to the rules of conduct and operation pertaining to CATV, the Commission has initially drafted its regulations on the premise that there is a presumption or taint that CATV operation is "unfair" and adverse to the "public interest". *First Report and Order,* 38 F.C.C. 713.

Upon issuance of the Rules in March of 1966, CATV systems existing prior to February 16, 1966 were conferred "grandfather" rights, 47 C.F.R. 74.1107(d). However, they are still subject to a number of restrictive provisions. The Rule at issue here, Section 74.1103, requires all CATV systems to carry local television station signals and, upon the request of the local station, black-out signals that duplicate local programs, Section 74.1103(e). The rules permit a petition for waiver, Section 74.1109, but in acting on waiver petitions the Commission may summarily grant or deny the petition or specify other procedures, including oral argument or full evidentiary hearing, Section 74.1109(f). In short, under its new CATV rules, the Commission may treat the existing CATV system and its petition for waiver in any manner it chooses and subject it to any procedure it may

arbitrarily select under the amorphous umbrella of "consistent with the public interest." Since it appears before the Commission with the taint that its operations are adverse to the public interest, the CATV system must overcome this presumption before gaining the relief sought. Thus far the Commission has shown little inclination to listen to the individual CATV waiver petition and why its general rules do not apply in the particular circumstance.

Although the Commission did not initially license or otherwise authorize the existing operation of petitioner's CATV service, the Commission now seeks to exercise complete licensing authority over petitioner's business, while relegating it to "second class" business status. Without any statutory licensing standard for reasonable protection of market allocation of CATV, the Commission, by its new rules has created a special class of licensee. It has effectively placed CATV operators under its vast powers and authority in dictating which, if any, services can continue to be furnished over cable facilities, yet at the same time, denying the traditional safeguards and protections guaranteed to all licensees.

The practice of creating a special class over which the administrative body seeks greater regulatory control was condemned in *Standard Airlines, Inc. v. Civil Aeronautics Board,* 177 F.2d 18 (D.C. Cir. 1949). In that instance, the C.A.B. granted "letters of registration" to a special class of irregular carriers with the right to suspend or revoke them at any time, instead of issuing the usual certificate of public convenience. The court overruled the Board action on the ground that it could not create a special class in order to circumvent the right to evidentiary hearing of the revocation of a license.

The same device is employed here where the Commission "confers" grandfather rights over an existing industry where previously it had held it had no jurisdiction; then attaches to it a tainted business category of unfair competition; and proceeds by its special regulatory edicts to destroy large portions of the industry—while denying any hearings or minimum safeguards allowed to all licensees and the favored groups protected by its new rules. See also this Court's opinion in *Southwestern Cable Co. v. United States,* 378 F.2d 118 (9th Cir. 1967) discussed *infra,* which held that the Commission's power to make rules was limited to its "licensing authority."

The new CATV Rules are in startling conflict with the requirements of the Administrative Procedure Act, the Communications Act, and the Commission's own rules in other areas of direct control and regulation. The CATV operations and the application of the new rules fall squarely within the problems and procedures outlined in the Administrative Procedure Act. The Commission's order in the instant case represents "final disposition"[14] and affirmatively orders compliance as contained in 5 U.S.C. 551(6) and formulation of this order is an "adjudication" as defined in 5 U.S.C. 551(7).[15] Pursuant to 5 U.S.C. 554, petitioner is entitled to a full hearing.

The provisions of Section 9 of the Administrative Procedure Act, 5 U.S.C. 558, protect licensees of agencies against

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14 " '[O]rder' means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing." (5 U.S.C. 551(6)).

15 "[A]djudication" means agency process for the formulation of an order." (5 U.S.C. 551(7)).

any "withdrawal, suspension, revocation, or annulment of any license" without a full evidentiary hearing. And Section 2(e) of the Administrative Procedure Act, 5 U.S.C. 551(8), defines "license", among other things, to include any "form of permission.[16]

Notwithstanding the statutory and regulatory requirements, as a matter of elementary fairness, it would seem that the Commission should give, at minimum, the same protections and safeguards to the CATV industry, over which it assumes inferential control, as it allows to the broadcasting industry, over which it has direct statutory licensing control.

B. A Waiver Petition Containing Substantial and Material Issues of Fact Requires an Evidentiary Hearing

Section 309 of the Communications Act of 1934, 47 U.S.C. 309, provides for certain standards in granting of applications for licenses. The initial standard by which all applications are to be judged is a finding by the Commission of whether a public interest, convenience, and necessity will be served by the grantings of such applications. Subsection (e) of 309 provides that when a "substantial and material question of fact is presented" or the Commission for any reason is unable to make the finding of public interest, the Commission shall formally designate the application for hearing in which all interested parties may participate. See

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16 " '[L]icense' includes the whole or part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission." (5 U.S.C. 151(8)) " 'Licensing' includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license." (5 U.S.C. 551(9)).

Ashbacker Radio Co. v. F.C.C., 326 U.S. 327 (1945); *Folkways Broadcasting Co. v. F.C.C.*, 375 F.2d 299 (D.C. Cir. 1967). The same reasons which require the Commission to examine substantial and material issues of fact in determining the public interest for the grant of licenses, also require an examination of substantial and material issues of fact in a waiver petition.

Petitioner's verified petition for waiver of Section 74.1103 of the Commission's rules [17] contains substantial and material factual issues warranting a hearing. Although the Commission recognized the substantiality of the allegations of fact, and summarized them in its findings, it summarily dismissed the petition for waiver without a hearing on the ground that the allegations were not adequately supported.

In paragraph 2 of it Memorandum Opinion and Order of April 4, 1967, the Commission summarized the pertinent and substantial factual allegations. The summary included the allegations that (1) the interested local station, dependent upon revenue from a distant Canadian audience and advertising market, experienced no adverse economic impact from the CATV system; (2) the exclusivity requirement would virtually eliminate two Seattle stations from the systems, thereby disrupting service and the natural consequences of lost business from a diminution in promised service; and (3) through its

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[17] Under the Commission's rule of practice, 47 C.F.R. 1.52, the attorney's signature "constitutes a certificate by him that he has read the document; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay." The waiver petition was not only signed by petitioner's attorney, but contained also a sworn affidavit of verification by the officer of petitioner most familiar with the facts and circumstances of the case.

local program origination of news and civic events the CATV systems better served the local public interest than did the local television station directed at a more lucrative, distant Canadian market. (R. pp. 110-111; 7 F.C.C. 2d at 611-612).

Without examination, the Commission summarily disposed of these issues in paragraph 4 by referring to its *Second Report and Order* and the factual conclusions made there that CATV threatens local television and that CATV is not adversely affected by the obligation of providing same-day program exclusivity. As to local program origination and which medium in fact best represents the local public interest, the Commission held this issue to be irrelevant to the exclusivity requirement.

Thus, the Commission has demonstrated that although it had provided for waiver of the rules and an evidentiary hearing in Section 74.1109, it did not intend in any case, to vary from its factual, as well as legal, preconceptions contained in the *Second Report and Order.* Any attempts to show that these factual preconceptions did not conform to local conditions would not be tolerated. The entire basis for the exclusivity rules, the Commission explained, was the adverse impact that CATV might have on the growth of local television and the splintering or fractionalizing of its audience. Yet in paragraph 4, the Commission callously, if candidly, states that it is not concerned whether there is in fact an adverse economic effect on the local television.

In paragraph 4 of its original order, the Commission concluded that same-day exclusivity would not unduly interrupt CATV service. Again, the Commission demonstrates that it will not be persuaded or even hear evidence which varies from its factual premise in formulating the *Second Report and Order.* What may be true as a general principle, does not fit the particular circumstances here. This would seem to be the

very reason for the formulation of the waiver provisions. Yet the Commission will not recognize exceptions. Under such practice, the waiver provisions are idle and meaningless and designed only to fit existing legal precedents.

Interstate Broadcasting Company v. F.C.C., 323 F.2d 797 (D.C. Cir. 1963) reversed the Commission's action in denying an application for license without a hearing. The court held that, although under the "Storer doctrine" an applicant is not absolutely entitled to a hearing, in rejecting a hearing the Commission must make definite findings and adequately explain its conclusions and support them with specific findings of fact. The D.C. Circuit cited its earlier opinions in *Television Corp. of Mich., Inc. v. F.C.C.,* 294 F.2d 730, 733 (D.C. Cir. 1961), where the court found a bare assertion by the Commission that its action was "clearly in the public interest," an inadequate explanation to support its order; and *Telanserphone, Inc. v. Federal Communications Com'n,* 231 F.2d 732, 735 (D.C. Cir. 1956), which reversed a Commission order because the conclusions were not adequately supported by a record for review. See also *American Trucking Association v. F.C.C.,* 377 F.2d 121 at 134 (D.C. Cir. 1967), *cert. denied,* 386 U.S. 943 (1967). The only substantial finding made by the Commission in this action is contained in paragraph 5 of its Order. "The requested waivers . . . would not be consistent with the public interest." The conclusion lacks adequate factual support.

In *Civil Aeronautics Board v. Delta Air Lines,* 367 U.S. 316 (1961), the Supreme Court stressed that financial impact on an existing business was a critical issue for careful examination through a full evidentiary hearing. Similarly, *Folksways Broadcasting Co. v. F.C.C.,* 375 F.2d 299 (D.C. Cir. 1967), in reversing the denial of a hearing on a television application, held that economic impact and possible destruction of an

existing station by a grant of a license required the Commission to conduct a hearing under 47 U.S.C. 309. Here also economic impact is a principal issue and again the Commission has improperly refused to allow a hearing.

In *Buckeye Cablevision, Inc. v. F.C.C.*, ___ F.2d ___ (District of Columbia Circuit, No. 20,274, decided June 30, 1967) where the Commission sought to compel a hearing against a CATV system in a cease and desist proceeding, the government explained that it did not intend to enforce the CATV rules where there was no particular need. It successfully persuaded the court that it planned to make an *"ad hoc"*, "case-by-case" examination, because the adverse econonic impact of CATV on local television was "not yet clear enough for the application of fixed prohibitions." On this earnest assertion by the Commission, the court was persuaded that "the rules are not a flat bar against distant-signal importation" and that the rules may only be temporarily imposed and removed on a showing that they will not adversely affect local broadcasting. The careful case-by-case review promised in *Buckeye* has not been forthcoming here for the Commission stoutly refuses to make any particular examination of the existing factual circumstances of petitioner's CATV systems *vis-a-vis* the local television station.

C. The Issuance of a Proscriptive Order Against a Non-Licensee Without Hearing Is in Violation of Section 312 of the Communications Act

In its memorandum opinion and order, released April 4, 1967, the Commission denied without hearing petitioner's application for a waiver of the exclusivity provision contained in Rule 74.1103(e). Then the Commission on its own motion went a step further and added:

> "IT IS FURTHER ORDERED, That Total Telecable, Inc., IS DIRECTED to comply with the requirements of Section 74.1103(e) of the Commission's rules on its CATV systems serving Anacortes, Bellingham, Burlington, Mount Vernon, and Sedro Woolley, Wash. within 30 days of the release date of this memorandum opinion and order." (7 F.C.C. 2d at 623) (R. p. 113)

The Commission did not explain by citation or reference under what statutory authority it was acting for the issuance of such an order. Nor were any factual findings made as to what duplication was in progress and what exclusivity was required. Moreover, no examination or testing was made of the public interest to determine if the Commission's preconceptions of protection of local television required the drastic action ordered.

The Commission's order forcing petitioner to insure exclusivity is proscriptive in nature and tantamount to a cease and desist order under Section 312 of the Act, 47 U.S.C. 312.

Similar summary action by the Commission operating under the new CATV rules has recently been condemned and reversed by this Court in *Southwestern Cable Co. v. United States,* 378 F.2d 118 (9th Cir., 1967). In that case the Commission ordered a freeze on the expansion of a CATV system carrying Los Angeles television stations into the San Diego area while it investigated the effect of such carriage. In its petition for review the CATV system challenged the Commission's authority to issue such an order and at the same time broadly attacked the Commission's power and authority over CATV and the constitutional validity of its *Second Report and Order,* 2 F.C.C. 2d 725 (1966).

In response, the Commission contended that its action was not a cease and desist order under 47 U.S.C. 312, but

was a grant of temporary relief under Section 74.1109 (f), which in turn, it claimed, was an exercise of its rule making authority under Sections 4(i) and 303(r) of the Communications Act, 47 U.S.C. 154(i) and 303(r). The Court rejected this argument pointing out that the order was prohibitory in nature and thus amounted to a cease and desist order, and that the Commission could not circumvent the safeguards of 47 U.S.C. 312 by misapplication of it s rule making authority. In its careful opinion, Judge Barnes explained that "the method of regulation of broadcasting chosen by Congress was *licensing*" and "4(i) and 303(r) are limited to the scope of the Commission's *licensing authority*". The Court concluded that as against a *non-license*, the Commission's only authority to issue proscriptive orders was limited to action under 47 U.S.C. 312, with the safeguards of a full adjudicatory hearing as provided in that section.

Here the Commission's action is even more proscriptive in nature than in *Southwestern*, since petitioner is ordered not just to maintain the *status quo*, but to cease and desist from operating an existing part of its business, maintained for over sixteen years. As in *Southwestern*, *supra*, such an order must fail because it was issued without the minimum safeguards provided by Congress under Section 312.

D. Enforcement of Exclusivity Provision by the Local Broadcaster Is an Unreasonable Restriction and Delegation of Authority

Under the Commission's new CATV rules, exclusivity is not automatic but must be invoked, oddly not by the Commission's action, but by action and request of the competitor television station under Section 74.1103(f), which provides:

> "Where a station is entitled to program exclusivity the CATV system shall, upon the request of the

> station licensee or permittee, refrain from duplicating any program broadcast by such station."

This rule places in the hands of the preferred TV broadcaster the power to invoke the rules at will. It delegates to the local commercial station the regulation and control of communications matters which Congress has exclusively delegated to the Commission. Underlying this rule is the Commission's stated belief that CATV duplication constitutes unfair competition. The Commission has neither the authority nor the jurisdiction to determine questions of unfair competition. *Cable Vision, Inc. v. KUTV, Inc.*, 335 F.2d 348 (9th Cir. 1964), *cert. denied,* 379 U.S. 989 (1965). Regulation and control to prevent unfair methods of competition fall under the jurisdiction of the Federal Trade Commission, 15 U.S.C. 45(a). The Commission has no similar authority. Not only has the Commission selected television braodcasting for special preferential treatment, but it has placed in the broadcaster's hands the additional economic force of control of these rules. Manifestly such a rule is unwise, unfair, and invalid.

This delegation of enforcement of the CATV rules to the competitor industry is in conflict with *Federal Communications Commission v. Sanders Brothers Radio Station,* 309 U.S. 470 (1940), where the Supreme Court emphasized that the Communications Act, unlike many other industry regulatory acts, "recognizes that the field of broadcasting is one of free competition." Free competition, according to the Commission's erroneous view, exists only for the favored class, and will all but disappear as between broadcaster and CATV if the F.C.C. can delegate authority to the competitive industry a practice of enforcing a scheme of exclusivity of broadcasting in carriage of programs by CATV systems.

E. The "Storer Doctrine" Supports a Hearing in a Waiver Petition and Before Issuance of a Proscriptive Order on the Merits

Respondents rely principally on *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956); *Federal Power Commission v. Texaco*, 377 U.S. 33 (1964); and *American Airlines, Inc. v. Civil Aeronautics Board*, 359 F.2d 624 (D.C. Cir. 1966). This reliance is misplaced for none of these cases condoned proscriptive action against non-licensees in a waiver proceeding.

In *Storer* the Commission promulgated rules limiting the number of television stations in the hands of a single owner to five stations. Storer, already owning five, was denied application for a sixth. Storer challenged the rule and the denial of a hearing on its application. The Supreme Court held that the Commission could deny the application without a hearing and that to receive a hearing, Storer should have applied for a waiver setting forth sufficient reasons.

Federal Power Commission v. Texaco, 377 U.S. 33 (1964), upheld the F.P.C.'s summary denial of an application for public convenience and necessity involving contracts with pricing agreements other than those permissible under F.P.C. regulations. Relying on *Storer, supra*, the Court explained that the statutory requirement for a hearing does not preclude an administrative agency "from particularizing statutory standards through the rule making process and barring at the threshold those who neither measure up to them nor show reasons why in the public interest the rule should be waived." 377 U.S. at 39. But the Court hastened to point out that this denial of the application was not a decision on the merits and directed attention to the waiver procedure. "Facts might conceivably be alleged sufficient on their face to provide a basis for waiver of the price-clause rules and for a hearing on the matter" (337 U.S. at 40-41).

On remand, *Pan American Petroleum Corp. v. Federal Power Commission,* 352 F.2d 241 (10th Cir. 1965), the circuit court reiterated the Supreme Court's holding that the denial did not pass on the merits and again directed attention to the waiver provisions, which under proper circumstances would permit a hearing. The court stated:

> "If the effect of the questioned orders is to deprive a petitioner of a substantive right, the way is left open for the protection of that right. The Commission's [FPC] Rules of Practice and Procedure, Section 1.7(b), permit a request for a rule waiver in a rate filing. This opens the way for a party who claims aggrievement by a regulation to obtain a review of its applicability to his particular situation." 352 F.2d at 245.

See also *Sun Oil Co. v. F.P.C.,* 355 F.2d 181 (5th Cir., 1965), citing, *Texaco, supra,* in holding that a waiver petition is the proper route to receive an evidentiary hearing.

Following the Supreme Court's teaching in *Storer* and *Texaco,* petitioner here applied for a *waiver* of the Commission's rules to maintain its existing service and preserve the substantial property interest in its sixteen year business. Unlike *Storer* and *Texaco,* the waiver application set forth facts demonstrating that under the particular circumstances the public interest was not adversely affected and that enforcement of the rule would threaten petitioner's business. The Commission ignored the waiver application and the facts asserted therein and summarily dismissed the petition without hearing. It acted in the same manner as if petitioner had challenged the rule without requesting waiver, as provided in the rules and as recommended in *Storer.* Further, the Commission did not merely deny the application but it passed

upon the merits, ruled on the public interest, and ordered compliance with its rule within 30 days, thus threatening petitioner's existing business. While purportedly proceeding under *Storer* and *Texaco*, the Commission has ignored its teaching as applied to waiver petitions.

Respondents also rely upon *American Airlines, Inc. v. Civil Aeronautics Board*, 359 F.2d 624 (D.C. Cir., 1966). With respect to rule-making, the D.C. Circuit *en banc* held that an agency could properly "promulgate rules of general application consistent with the Act and . . . deny an adjudicatory hearing to applicants [for licenses] whose applications on their face showed violations of the rule" (359 F. 2d at 328).[18] But in the field of communications, the Supreme Court has made plain that "the Congress has not, in its regulatory scheme, abandoned the principle of free competition." *F.C.C. v. Sanders Bros. Radio Station*, 309 U.S. 470, at 474. Indeed, the Court in *Sanders* said:

> "Plainly, it is not the prupose of the act to protect a licensee against competition . . . Congress intended to leave competition in the business of broadcasting where it found it . . . ." (309 U.S. at 475)

Later in *Carroll Broadcasting co. v. F.C.C.*, 258 F.2d 440 (D. C. Cir. 1958), it was explained that the doctrine of "free competition" was tempered only to the degree where it

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[18] There is a vast distinction between enactment of rules designed to establish basic minimum standards for applicants for licenses as approved in *American Airlines*, and adoption of rules intended to restrict the conduct of businesses which are neither licensed by the agency nor required to apply for licensing authority, such as in the instant case.

could be demonstrated , on the facts and after hearing, that such competition would result in harm to the public interest. But the court in *Carroll* was careful to emphasize that the presumption is weighed heavily in favor of free competition and that the task of demonstrating injury to the public interest is "certainly a heavy burden" (258 F.2d at 444). Here the purpose of the F.C.C. rule is to restrain competition; the presumption of the rule is that the favored broadcaster is entitled to protection from competition; and the burden has, by rule, been shifted to the CATV system to demonstrate that it is entitled to compete freely. In short, the rule complained of here is "inconsistent" with the Act since it reverses the established basic current of communications law that free competition is to be presumed.

Accordingly, the rule fails the test imposed by *American Airlines, supra,* since an agency may issue rules of general application only if they are "consistent with the Act" (359 F.2d at 628). Thus, the rule [Section 74.1103] itself is unlawful.

In *American Airlines, supra,* the D. C. Circuit approved agency procedures adopting a regulation permitting only "all-cargo" carriers to provide blocked space service. The "combination" carriers (carrying cargo and passengers) protested that the rule affected existing certificates of convenience and could not issue until after a full adjudicatory hearing. In rejecting the argument, the court cited *Storer* and *Texaco* and expanded the doctrine of these cases as applying to rights under existing certificates, as well as prospective rights in applications for certificates.

In *American Airlines,* the D. C. Circuit has gone further than any other[19] in applying the *Storer* doctrine, as the three dissenting judges pointed out:

> "*United States v. Storer Broadcasting Co.,* 351 U.S. 192 (1956) upon which the majority chiefly relies, as well as *F.P.C. v. Texaco,* 377 U.S. 33 (1964), and *National Broadcasting Co. v. United States,* 319 U.S. 190 (1943), are cases dealing with rulemaking applying *across the board to all applicants* for licenses of certificates. Petitioners there were not being deprived of any authority they had formerly exercised; in those cases rulemaking was used to formulate reasonable, nondiscriminatory criteria to be met as conditions of receiving certificates in the first place." (359 F.2d at 635).

But even with this broad expansion, the court did not go so far as respondents ask the Court to go here. There complainants did not apply for waiver , but broadly challenged the Commission's power to regulate. The regulation and ruling contained no proscriptive order applicable to *non-licensees,*

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[19] Compare this Circuit's opinion in *Superior Oil Company v. Federal Power Commission,* 322 F. 2d 601 (9th Cir., 1963), *cert. denied,* 377 U.S. 922 (1964), which upheld summary denial of *applications* involving prohibited contract escalation clauses, but distinguished existing rights:

> "But the rules here under challenge are not adjudicatory in nature. They do not affect any contractual right which was in existence when the rule became effective. The problem would be different if the effect of the rules was to prescribe rates already in effect." (322 F.2d at 615).

but issued to apply only to those over which it had direct regulatory authority and control. Moreover, despite its ruling, the court held the door open to make whatever showing or submit evidence to show the direct harm of the regulation. The court noted in passing that to date no harm had resulted from the regulation and that there was a possibility of proceeding merely to delay the effect of the new regulation.

Here, the Commission has issued in a waiver procedure a proscriptive order against a non-licensee halting a substantial part of its existing business without so much as allowing a minimum hearing or the presentation of evidence in support of its allegations The Commission's action and order exceeded its statutory and regulatory authority, and under the suggested action in *United States v. Storer Boradcasting Co.*, 351 U.S. 192 (1956) and *F.P.C. v. Texaco*, 377 U.S. 33 (1964), petitioner is entitled to a hearing in its waiver petition.

CONCLUSION

For the foregoing reasons, Petitioner prays that the Court enjoin, set aside, vacate and declare unlawful the order of the Federal Communications Commission as contained in its memorandum opinion and orders of April 4 and July 14, 1967; that it declare unlawful the CATV Rules promulgated by the Federal Communications Commission as beyond the jurisdiction of the Commission; or in the alternative, that it declare that the Petitioner is entitled to a full evidentiary hearing on its petition for waiver; and that

it remand the matter to the Commission with instructions to conduct an evidentiary hearing consistent with the Court's opinion.

Respectfully submitted,

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October 6, 1967

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Alan Raywid

APPENDIX–A

Legislative History of Proposed Amendments to the Communications Act, Conferring Jurisdiction over CATV

I

After lengthy hearings on September 5, 1959, during the 86th Congress, First Session, the Committee on Interstate and Foreign Commerce submitted Senate Report 923 accompanying and recommending passage of Senate Bill S. 2653, entitled "A bill to amend the Communications Act of 1934 to establish jurisdiction in the Federal Communications Commission over Community Antenna systems." The bill provides as follows:

> That section 3 of the Communications Act of 1934 (47 U.S.C. 153) is amended by inserting at the end thereof the following: "(hh) 'Community antenna television system' means any facility performing the service of receiving and amplifying the signals transmitting programs broadcast by one or more television stations and redistributing such programs, by wire, to subscribing members of the public, but such term shall not include (1) any such facility which serves fewer than fifty subscribers, (2) any such facility which serves only the residents of one or more apartment dwellings under common ownership, control, or management, and commercial establishments located on the premises, or (3) any such facility used only for the distribution, by wire, of programs for which a charge is imposed generally on all subscribers wherever located and which are not in the first

instance broadcast for reception without charge by all members of the public within the direct range of television broadcast stations."

Sec. 2. Section 3 (h) of the Communications Act of 1934 (47 U.S.C. 153) is amended to read as follows:

"(h) 'Common carrier' or 'carrier' means any person engaged as a common common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this Act; but a person engaged in radio broadcasting or in operating a community antenna television system shall not, insofar as such person is so engaged, be deemed a common carrier."

Sec. 3. Title III of the Communications Act of 1934 (47 U.S.C. 301 and the following) is amended by inserting therein a new section 330 as follows, entitled:

"COMMUNITY ANTENNA TELEVISION SYSTEMS

"Sec. 330. (a) No person shall operate a community antenna television system except under and in accordance with this Act and with a license granted under the provisions of this Act: *Provided,* That a Community antenna television system which is in operation on the date of the enactment of this section may continue to operate until the Commission issues a license therefor: *Provided further,* That any system continuing to operate in accordance with the foregoing shall, not later than one hundred and twenty days after such enactment, submit an application for a license containing all the information required by the Commission to be submitted with such application.

"(b) (1) The provisions of sections 303, 304, 307, 308, 310, 311, 312, 313, 315, and 316 relating to stations, radio stations, broadcasting stations, licenses therefor, licensees thereof, and station operators shall apply also to community antenna television systems, licenses therefor, licensees thereof and operators thereof.

"(b) (2) The provisions of section 317 relating to matters broadcast by any radio station, and section 326 relating to radiocommunications shall be deemed to apply also to all matter distributed to its subscribers by a community antenna television system.

"(b) (3) The provisions of section 319 relating to construction permits shall apply also to the construction and licensing of a community antenna television system: *Provided,* That the Commission, if it finds that the public interest, convenience and necessity would be served thereby, may waive the requirement of a permit for such construction.

"(c) The public interest, convenience, and necessity will be deemed to be served by the grant of an application for a license for the provision of existing program services by a community antenna television system which was in operation on the date of the enactment of this section subject to such conditions as the Commission may impose under subsection (d) hereof.

"(d) (1) Either prior to or within thirty days after the grant of an application for a license or a renewal thereof for a community antenna television system which was in operation on the date of the enactment of this section, the licensee of a television station assigned to a community in which such community antenna television system serves subscribers may petition the Commission to include in such license such conditions on the community antenna television system's operation as will significantly facilitate the continued

operation of a television station which is providing the only available locally originated television broadcast program service.

"(d) (2) Such petition shall describe, in detail, the proposed operating conditions, and shall set forth, with particularity, the material effect of the proposed conditions on such continued television station operation. The community antenna television system shall be afforded an opportunity to respond to such petition within thirty days after public announcement of the filing thereof. After the expiration of such thirty-day period, the Commission shall determine whether the petition meets the foregoing requirements, and, if it does, shall determine whether, with due regard to service rendered by the community antenna television system and by petitioner's station, the public interest, convenience and necessity would be served by the adoption of the proposed or any other operating conditions. Public evidentiary hearings shall be held thereon if requested by either the petitioner or the community antenna television station within thirty days after public ammouncement of such determination, or if ordered by the Commission on its own motion prior to its determination.

"(d) (3) Any community antenna television system license issued under subsection (c) above shall be subject to conditions imposed in accordance with this subsection but any such license so issued shall not be stayed pending the Commission's final decision on any petition filed hereunder.

"(e) Findings by the Commission as to the effect upon the public interest, convenience, and necessity of the grant of an application or renewal or modification *thereof* for a community antenna television system which was not in operation on the date of

the enactment of this section or for modification of a license for a community antenna television system which was in operation on the date of enactment of this section shall be made with due regard for the desirability of facilitating the continued operation of a television station which is providing the only available locally originating television broadcast program service. The provisions of section 309 shall apply to the issuance of licenses, modifications, and renewals thereof under this subsection.

"(f) (1) Upon application by the licensee of a television broadcast station (other than a station engaged solely in rebroadcasting) which is assigned to a community in which a community antenna television system provides television programs to local subscribers, the Commission may require that such community antenna service shall regularly redistribute programs broadcast by such local television broadcast station.

"(f) (2) The Commission may, by rule or order, prescribe such standards and conditions as it may find necessary to assure that the reception of the programs redistributed by the community antenna television system under subsection (1) shall be reasonably comparable in technical quality to the reception of programs of other television stations redistributed by the community antenna television system.

"(f) (3) The Commission also may, by rule or order, prescribe the period of time within which community antenna television systems shall complete preparations for and commence the redistribution of programs under subsections (1) and (2).

"(g) The Commission shall prescribe appropriate rules and regulations in order to avoid the duplication of programs broadcast or scheduled to be broadcast

by a television station (other than a station engaged solely in rebroadcasting) which is assigned to a community in which a community antenna television system serves subscribers by such communtiy antenna television system redistributing the signals of another television station. In promulgating such rules and regulations the Commission shall be guided by the standard set forth in subsection (c) of this section, requiring that due regard be given for the desirability of facilitating the continued operation of a television station which is providing the only available locally originating television broadcast program service."

The Committee report explained the purpose of the bill was to place CATV under the jurisdiction of the FCC.

> This bill is designed to amend the Communications Act of 1934 so as to place community antenna television systems (CATV) under the jurisdiction of the Federal Communications Commission and to empower the Commission to issue requisite certificates of public interest, convenience, and necessity for the construction and operation of community antenna television systems. This bill declares CATV systems not to be common carriers and sets forth the sections of title III of the Communications Act affecting regular broadcasters that are to apply to the community antenna television systems.
>
> (Senate Report 923, p. 3)

The Report summarized the Commission's treatment of CATV since its inception and referred to its disclaimer of jurisdiction in *Frontier Broadcasting v. Collier,* 16 Pike and Fischer R.R. 1005 (April 1958).

> The question of the FCC's jurisdiction over community antenna television systems and the type of

> regulation that should be imposed was raised many years ago. The FCC's files make it clear that this issue was presented to it as early as 1950 and that its staff recommended that it exert authority in this field. But, the Commission has long hesitated over the matter. In speeches by individual commissioners and in testimony before your committee, doubt as to its power has been expressed but no official ruling was made until April 21, 1958, when the FCC decided a long-pending proceeding instituted by a group of small-town broadcasters who asked that the Commission regulate CATV systems as common carriers. (*See Frontier Broadcasting Company v. Collier,* 16 R.R. 1005 (April 1958). The Commission's final action in this matter made it perfectly clear that it did not intend to regulate CATV systems in any way whatsoever. However, on May 22, 1958, the FCC instituted an inquiry into the impact of community antenna television systems, television translators, television satellite stations, and television reflectors upon the orderly development of television broadcasting (docket No. 12443) and included as part of that proceeding the reconsideration of the above-mentioned *Frontier Broadcasting* case. (Senate Report 923, p. 5)

After several amendments to the bill were offered, S. 2653 was debated on the Senate floor on May 17 and 18, 1960. Senator Pastore, chairman of the sponsoring committee, was the floor leader and explained that the bill was not designed to hurt CATV, but merely place it under regulatory control:

> This bill is not directed in any way toward injuring CATV as such. We seek merely to place CATV systems under regulation in order to protect their rights, and also to protect the rights of the only available broadcasting station, which may perish and go out of

existence unless proper reforms are taken now of a very moderate nature.
(106 Cong. Rec. 10417)

Senator Pastore was questioned at length on the purposes of the bill and explained it was a new delegation of authority of jurisdiction over CATV. In a brief colloquy Senator Pastore stated:

> Mr. CURTIS. First, I thank the distinguished Senator for his long efforts in a difficult area. I have given very limited study to S. 2653. It appears to me that the proposed legislation places the community antenna systems under the jurisdiction of the Federal Communications Commission. To that extent there is a delegation of authority to them. Does the bill directly prohibit or outlaw any act that the community antenna systems are doing now?
>
> Mr. PASTORE. I do not think so, aside from the fact that now they are at liberty to take a picture from a broadcasting station in Phoenix and show it in Yuma, for example. It may be earlier than the picture would be shown on the local broadcasting station in Yuma, and if the broadcasting station at Yuma made an application to the FCC, it could bring that to a stop. That would be a deprivation of some activity. That is about as far as it would go.
>
> Mr. CURTIS. The bill grants to the Commission the right to look into that situation?
>
> Mr. PASTORE. And to make rules and regulations.
>
> Mr. CURTIS. To make rules and regulations.
>
> But in the absence of action by the Commission, is there anything in the bill which prohibits what the community antenna systems can do?
>
> Mr. PASTORE. I would not say so, unless the Senator sees something in the bill to the contrary.
> (106 Cong. Rec. 10425)

In answer to questions by Senator Kerr, an opponent of the bill and the grant of jurisdiction to the FCC over CATV, Senator Pastore explained that the jurisdictional grant was necessary to develop an orderly system of TV:

> Mr. PASTORE. Then it is necessary to put these people under regulation, so that as new licenses are granted the Federal Communications Commission will have jurisdiction. The FCC then will be in a position to develop an orderly system of TV. However—and this must be borne in mind—insofar as harassment is concerned, or so far as a burden may be incurred, because of the duties that are imposed upon a CATV organization where there is no problem, I would assume the action of the Federal Communications Commission would be nothing more than perfunctory. (106 Cong. Rec. 10426)

The Kerr-Pastore debate demonstrated that the issue before the Senate was whether the FCC was to gain jurisdiction over CATV through the passage of the amendment—jurisdiction which it admittedly lacked:

> Mr. KERR. Did it ever occur to the Senator from Rhode Island that there are hundreds and thousands of American businesses in operation who are praying unto the Lord and their Government to protect them by keeping them free of regulation, rather then imposing it on them and then having them depend upon a legislative record made on the floor of the Senate which, if someone downtown whose identity we do not know, is controlled by it, will let them loose after they have paid a bunch of lawyers in Washington to come down to get them loose?
>
> The Senator says he cannot write a bill to protect these people. Apparently the Senator does not know his own ability.
>
> * * *

Mr. PASTORE. There was not one representative of a CATV who appeared before our committee who did not say that he wanted to be regulated. I call as my chief witness the Senator from Oklahoma [Mr. MONRONEY], who is going to make the motion to recommit the bill. As a matter of fact, Senator MONRONEY introduced a bill himself to regulate the entire industry. However, that bill is only a shell. It does put them under regulation, but it does not regulate.

Mr. KERR. Next to not being under it, that is the best shape one can be in.
(106 Cong. Rec. 10426)

Senator Pastore urged that by conferring jurisdiction over CATV, the bill would actually provide protection to CATV systems against exorbitant charges by the broadcast station, should the stations prevail in pending copyright litigation. Senator Kerr countered that the FCC through its present jurisdiction over the broadcasters could protect CATV without extending its jurisdiction to CATV.

Mr. KERR. Did the Senator from Rhode Island say the Federal Communications Commission, which has control of the station whose signal is being picked up, could not control them without this act?

Mr. PASTORE. I did not say that.

Mr. KERR. That is what the Senator did say.

Mr. PASTORE. I said the CATV would not have any right to go before the FCC.

Mr. KERR. Who says they would not?

Mr. PASTORE. I say so.

Mr. KERR. Who prescribes that?

Mr. PASTORE. Because the Senator says they should be put under the CATV. That is just the point.

Mr. KERR. Cannot a person go into court and ask for justice, without being set aside by the court?

Mr. PASTORE. The FCC is not a court. It is a regulatory body. We are trying to put the parties under this body with appropriate procedures.

Mr. KERR. The Senator wants to make them slaves, without provision for protection of their lives. How silly can one get?

Mr. PASTORE. I am not silly. I am talking about jurisdiction.

Mr. KERR. So am I.

Mr. PASTORE. I am talking about jurisdiction, and there is nothing silly in it.

Mr. KERR. The Federal Communications Commission does not have to be given regulatory control over any citizens to enable those citizens to go before that Federal Communications Commission and file a petition.

Mr. PASTORE. A petition to do what?

Mr. KERR. To enforce any right that an American citizen has with reference to that Commission's jurisdiction.

Mr. PASTORE. The Senator could not be more wrong than he is.

(106 Cong. Rec. 10429)

Senator Pastore, the floor manager, insisted that the bill was necessary to confer CATV jurisdiction upon the FCC, and that without it, the Commission was powerless to act.

Regarding the effects of the bill in conferring jurisdiction, Senator Monroney emphasized that it would provide unprecedented economic protection to broadcasters.

> The only test for the granting of a license for a television or a radio station, in the long history of the Federal Communications Act, has been, Is there a frequency

> available which will not interfere with the frequency assigned to someone else? A hundred television stations could be established if frequencies were available for them. If there is a radio station in Yuma, six stations could be put in if frequencies could be found for them. But we have never contemplated granting economic protection to licensees until this bill was introduced. We are breaking entirely new ground, which will extend in the future to such a point that other people will want to install television in an area, and it will be necessary to provide economic protection for the local single station. I do not think such a policy has ever been established.
> (106 Cong. Rec. 10535)

Senator Monroney compared the immunity from FCC regulation of reception and cable distribution by CATV to that enjoyed by the television networks:

> Mr. LONG of Louisiana. Does the bill violate the principle that the airways are free and are available to everyone?
>
> Mr. MONRONEY. I do not think it does. But it violates the principle of not having Federal regulation of cable transmission.
>
> Let me state the best illustration: All of us know that the mightiest force in television, which controls 90 percent of all television programs received by viewers in the United States, are the networks. They are not subject to regulation, and very few Members of Congress would want them to be regulated. Why? Because the concept of the Federal Communications Act is that the networks themselves are not putting anything on the air. They use cables to carry the signals to the local stations. So they are not regulated.

So we do not regulate—and I do not think we should —the mighty giant of television which supplies the television diet of 50 million television sets by carrying the television program signals by cable to the viewers.

But if the quite similar CATV systems are to be regulated by means of this bill, we shall be establishing a precedent; and in that event I do not see how we can properly regulate the smallest midget in the industry, but fail to give some consideration to regulating the mighty networks which are carrying signals by means of a similar system, and also without using the airways. (106 Cong. Rec. 10536)

Senators opposing the amendment recognized that the bill was designed to provide economic protection for television.

Mr. McCLELLAN. The meaning of the word "facilitate," as I understand it, is to make easy or less difficult; to free from difficulty or impediment. In other words, it is to facilitate the execution of a task; to lessen the labor of; to assist; aid.

In other words, the station owner could petition the Federal Communications Commission to impose conditions that will facilitate, that will aid, that will remove any difficulty, that will remove encumbrance or hindrence to the continued operation of that station.

Mr. MONRONEY. Which would mean limiting competition, which this bill is designed to do, from newly constructed CATV's.

* * *

Mr. McCLELLAN. In other words, the rules the Commission promulgates must be promulgated to achieve that purpose. That is the proposed law we are considering. I am not saying it is not a good thing,

but I think we ought to know what it does. This provision sets up a TV station in a position of preferred consideration, and in a position of preferred consideration in competition with another station.
(106 Cong. Rec. 10537)

Senator Long registered concern over the economic advantage to broadcasters conferred by the bill.

Mr. LONG of Louisiana. I am referring to page 4 of the bill, at line 21, where it provides:

A television station * * * may petition the Commission to include in such license such conditions on the community antenna television system's operation as will significantly facilitate the continued operation of a television station which is providing the only available locally originated television broadcast program service.

The thought that occurs to me is that it would seem to go far enough to say that the community antenna system should not impose any undue injury of hardship on the television station. However, to say that it could be required to operate in a manner to facilitate the continued operation of the competitor and system in his business, is too much to ask.

* * *

Mr. LONG of Louisiana. As the law stands today there is nothing in the law by which the FCC can prevent one television station from driving another one out of business. I have seen that happen in my state, where a VHF station came into the community which had a UHF station, by providing a better signal and better programs.
(106 Cong. Rec. 10541)

Senator Hickenlooper questioned whether the proposed amendment conferring jurisdiction upon FCC was constitutional.

> Mr. HICKENLOOPER. Mr. President, I merely wish to ask some questions of the Senator from Oklahoma or of another Member of the Senate.
>
> It seems to me that a rather conplicated legal situation could arise in this instance. As I understand, a CATV station merely takes something out of the air, and does not put anything into the air.
>
> Mr. MONRONEY. That is correct.
>
> Mr. HICKENLOOPER. After it takes something out of the air—just like using the air we breathe—it then wires it, by means of a physical operation, into a house, where it is hooked up to a television set.
>
> Mr. MONRONEY. That is correct.
>
> Mr. HICKENLOOPER. What justification is there for having the Federal Government move into that regulatory field? Can it be called interstate commerce? If so, can the Federal Government then regulate my radio set in my house because I take the signal out of the air by means of an aerial erected on top of my house?
>
> Mr. MONRONEY. This presents a problem, because many think this is exclusively in the field of interstate commerce. Of course, the ether waves are interstate. But when the signal is taken out of the air and is transmitted to the Senator's house by cable, that is purely intrastate.
>
> (106 Cong. Rec. 10543)

The issue to recommit the bill was plainly and openly acknowledged as an attempt to defeat it.

> Mr. KERR. Mr. President, I rise in support of the motion to recommit the bill. I do it for the simple reason that I think it is an absolute necessity to protect the well-being and the opportunity for existence of over 760 small businesses.
> (106 Cong. Rec. 10544)

The bill was recommitted by a vote of 39 to 38, 106 Cong. Rec. 10547. A vote to reconsider failed 38 to 36. As a post mortem to the defeat of S. 2653, Senator Moss, a proponent of the bill, asked for further study by Congress as to whether, in view of the bill's failure to pass, appropriate legislation should be enacted to grant the FCC some jurisdiction over CATV in order to protect local television.
(106 Cong. Rec. 11462)

Throughout the lengthy debate, both proponents and opponents assumed that the legislation was necessary in order to confer jurisdiction upon the FCC over CATV. The legislation failed to pass.

II

On February 22, 1961 in the 87th Congress, 1st Session, S. 1044 was introduced, entitled "a bill to amend the Communications Act of 1934 to authorized the Federal Communications Commission to issue rules and regulations with respect to community antenna television systems." Placed in the record was an explanatory statement prepared by the Commission, which states in part:

> In examining into this matter the Congress considered numerous legislative proposals and held hearings thereon. Two of these proposals, S. 2653 and H. R. 11041, would have established a broad-scale and mandatory licensing scheme for the some 500-700 community antenna television systems which are already in existence, as well as those proposed to be established in the future. While the Commission was in accord with

the general objective of these bills, it expressed the view that they were unnecessarily comprehensive in scope; would reach into situations which did not affect local television stations; and would unnecessarily add to the already large licensing functions of the Commission.

In contrast to the unduly widespread scope of these bills, the instant proposal is designed to vest in the Commission authority to act in those situations where local television stations are operating under inequitable disadvantages in competition with community antenna television systems. The Commission would thereby be enabled to address itself to the problem situations in the CATV-local station areas under a general power to make appropriate adjustments through the issuances of appropriate rules, regulations, and orders. The Commission would not, however, be encumbered by the administration of a mandatory licensing scheme for community antenna television systems, including the large number of such systems which are providing the only television service to sparsely settled areas.
(107 Cong. Rec. 2524)

* * * * *

Another instance of the way in which the Commission's jurisdiction might be exercised in appropriate situations lies in the field of duplication by CATV systems of programs being carried by the local station. The Commission would be empowered under the proposed legislation to order such adjustments as would, on an appropriate basis, permit the CATV system to continue to provide multiple television services, and at the same time afford to the local station some protection in its program offerings.

Since this legislative proposal looks to a limited jurisdiction over CATV's under the Communications Act of 1934, as amended, the enforcement and review

> provisions in section 312 (b) and titles 4 and 5 of the act would be available in connection with rules, regulations, and orders issued by the Commission with respect to CATV operations. (107 Cong. Rec. 2524)

Implicit in this memorandum is the understanding that such legislation was necessary in order to authorize the Commission to promulgate rules and regulations over CATV.

III

In the 89th Congress, S. 3017 was introduced on March 4, 1966, 112 Cong. Rec. 4689. [1] It was entitled "a bill to amend the Communications Act of 1934 to authorize the Federal Communications Commission to issue rules and regulations with respect to community antenna systems, and for other purposes." The bill provided no regulatory scheme or rules as did S. 2653, but merely conferred jurisdiction over CATV upon the FCC. It also barred program origination by CATV, and relegated it to the role of receiving and distributing broadcast signals. This bill was submitted subsequent to the FCC's assumption of jurisdiction and was designed, in the words its chairman, a confirmation of jurisdiction.

> The Commission had determined that it has jurisdiction over all CATV systems, and it has asserted that jurisdiction to the extent necessary to carry out the announced regulatory program. However, given the importance of CATV, we believe it highly desirable that Congress amend the Communications Act to confirm that jurisdiction and to establish such basic national policy as it deems appropriate.
>
> * * *

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[1] Citations to pages from the 89th Congress are to the daily edition, since the permanent edition is not yet available.

> Of prime importance is the proposed new section 331(a)(1) of the act, which would expressly confer upon the Commission, in broad and comprehensive terms, authority to regulate community antenna systems in the public interest. This authority is to be exercised only to the extent necessary to carry out the purposes of the Communications Act, particularly the establishment and maintenance of broadcast services and the provision of multiple reception services. There is thus a congressional recognition of the public service rendered by the broadcast and CATV industries and a directive to promote the orderly growth of both industries. (112 Cong. Rec. 4690)

Also, submitted along with the explanatory statement is the dissenting statement of Commissioner Loevinger who adhered to the previous FCC rulings that it had no jurisdiction.

SEPARATE STATEMENT OF COMMISSIONER LEE LOEVINGER REGARDING PROPOSED CATV LEGISLATION

> I believe it is necessary for Congress to legislate on the subject of community antenna television and that the draft of proposed legislation submitted herewith by the FCC is the best compromise that can now be agreed upon. It is my opinion that under present statutes the Commission does not have the jurisdiction which it claims over CATV's. See my separate opinion at 4 R R 2d 1679, 1712. If the Commission is to act in this field, legislative authorization is, therefore, necessary.

* * *

It would be desirable for Congress to establish more specific standards for administrative action than are contained in the proposed bill. But it is appropriate for Congress to delegate broad authority for the Commission to act under whatever standards Congress may see fit to establish.

Accordingly I join in recommending that Congress consider the proposed bill submitted herewith and enact legislation in such form as may best express the congressional view of the proper way to deal with the problems involving FCC jurisdiction to regulate CATV systems, the operation of CATV systems, the relations of CATV systems to conventional broadcasting stations, and the relation between Federal and State jurisdiction in this field.
(112 Cong. Rec. 4691)

The bill S. 3017, contains the following language:

"That section 3 of the Communications Act of 1934 (47 U.S.C. 153) is amended by adding at the end thereof a new subsection to read as follows:

"(gg) 'Community antenna system' means any facility which, in whole or in part, receives directly or indirectly over the air and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more broadcast stations and distributes such signals by wire or cable to subscribing members of the public who pay for such service."

SEC. 2. The Communications Act of 1934 is further amended by adding a new section to read as follows, entitled:

"COMMUNITY ANTENNA SYSTEMS"

SEC. 331. (a) The Commission shall, as the public interest, convenience or necessity requires, have authority:

"(1) to issue orders, make rules and regulations and prescribe such conditions or restrictions with respect to the construction, technical characteristics, and operation of community antenna systems, to the extent necessary to carry out the purposes of this Act, with due regard to both the establishment and maintenance of broadcast service and the provision of multiple reception services;

"(2) to make general rules exempting from regulation, in whole or in part, community antenna systems where it is determined that such regulation is unnecessary because of the size or nature of the systems so exempted.

"(b) No community antenna system shall transmit over its system any program or other material other than that which it has received directly or indirectly over the air from a broadcast station, except that the Commission may, upon an express finding that it would serve the public interest, authorize by general rule limited exceptions to permit such transmissions without any additional charge to subscribers.

"(c) Nothing in this Act or any regulation promulgated hereunder shall preclude or supersede legislation relating to, or regulation of, community antenna systems by or under the authority of any State

or Territory, the District of Columbia, the Commonwealth of Puerto Rico or any possession of the United States except to the extent of direct conflict with the provisions of this Act or regulations promulgated hereunder."

IV

Again in the 89th Congress 2d Session a bill was introduced conferring jurisdiction over CATV. On June 17, 1966 the House Committee on Interstate and Foreign Commerce issued Report No. 1635, accompanying H.R. 13286, entitled "a bill to amend the Communications Act of 1934 to authorize the Federal Communications Commission to issue rules and regulations with respect to community antenna systems, and for other purposes." The bill, as amended, provides:

That (a) section 3 of the Communications Act of 1934 (47 U.S.C. 153) is amended by adding at the end thereof the following new subsection:

"(gg) 'Community antenna system' means any facility which, in whole or in part, receives directly or indirectly over the air and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more broadcast stations and distributes such signals by wire or cable to subscribing members of the public who pay for such service."

(b) Subsection (h) of such section 3 is amended to read as follows:

"(h) 'Common carrier' or 'carrier' means any person engaged as a common carrier for hire, in interstate or foreign communications by wire or radio or in interstate or foreign transmission of energy, except where

reference is made to common carriers not subject to this Act; but a person engaged in radio broadcasting or in operating a community antenna system shall not, insofar as the person is so engaged, be deemed a common carrier."

SEC. 2 Part I of title III of the Communications Act of 1934 is amended by adding at the end thereof the following new section:

"COMMUNITY ANTENNA SYSTEMS"

"SEC. 331. (a) The Commission shall, as the public interest, convenience or necessity requires, have authority —

"(1) to issue orders, make rules and regulations, and prescribe such conditions or restrictions with respect to the construction, technical characteristics, and operation of community antenna systems, to the extent necessary to carry out the purposes of this Act, with due regard to both the establishment and maintenance of broadcast services and the provisions of multiple reception services; and

"(2) to make general rules exempting from regulation, in whole or in part, community antenna systems where it is determined that such regulation is unnecessary because of the size or nature of the systems so exempted.

The Commission shall, in determining the application of any rule or regulation concerning the carriage of local broadcast stations by community antenna systems, give due regard to the avoidance of substantial disruption of the services to subscribers of community antenna systems which were in operation on

March 1, 1966, resulting from the limited channel capacity of any such systems.

"(b) No community antenna system shall transmit over its system any program or other material other than that which it has received directly or indirectly over the air from a broadcast station, except that the Commission may, upon an express finding that it would serve the public interest, authorize by general rule limited exceptions to permit such transmissions without any additional charge to subscribers.

"(c) The Commission shall prescribe such rules and regulations and issue such orders as may be necessary to require the deletion by community antenna systems of signals carrying any professional football, baseball, basketball, or hockey contest if, after application by the appropriate league, the Commission finds that the failure to delete such signals would be contrary to the purposes for which the antitrust laws are made inapplicable to certain agreements under Public Law 87-331.

"(d) Nothing in this Act or any regulation promulgated under it shall preclude or supersede legislation relating to, or regulation of, community antenna systems by or under the authority of any State, the District of Columbia, the Commonwealth of Puerto Rico, or any possession of the United States except to the extent of direct conflict with the provisions of this Act or regulations promulgated under it."

In the purposes of the legislation the Committee was cautious not to challenge the FCC's already assumed jurisdiction.

> The principal purposes of the legislation are to —
> (1) delineate the scope of the authority of the Federal Communications Commission to regulate CATV systems. (H. R. Rep. No. 1635, p. 2.)

The Committee pointed out that although the Federal Communications Commission had asserted its jurisdiction over CATV, the Committee would not state a position, except to say that the Congress should confer this jurisdiction.

> In reporting the instant legislation, the committee does not either agree or disagree with the above conclusions. Test cases are pending at present in the courts. Therefore, the question of whether or not and to what extent the Commission has authority under present law to regulate CATV systems is for the courts to decide in such cases.
>
> It is the considered judgment of the committee, however, that in order properly to regulate broadcasting and communications in the United States the Commission should have the broad powers which the instant legislation would confer upon the Commission to regulate CATV systems. (H. R. Rep. No. 1635, p. 9)

The Commission, in its explanatory note attached to the Committee report, candidly admitted it wished the Congress to confirm jurisdiction which it had assumed.

> The Commission has determined that it has jurisdiction over all CATV systems, and it has asserted that jurisdiction to the extent necessary to carry out

> the announced regulatory program. However, given the importance of CATV, we believe it highly desirable that Congress amend the Communications Act to confirm that jurisdiction and to establish such basic national policy as it deems appropriate. (H.R. Rep. No. 1635, p. 16)

Commissioner Loevinger issued a separate statement explaining that although he favored the proposed legislation, he believed it necessary to confer jurisdiction upon the FCC.

> I believe it is necessary for Congress to legislate on the subject of Community Antenna Television and that the draft of proposed legislation submitted herewith by the FCC is the best compromise that can now be agreed upon. It is my opinion that under the present statutes the Commission does not have the jurisdiction which it claims over CATV's. See my separate opinion at 4 RR 2d 1679, 1712. If the Commission is to act in this field legislative authorization is, therefore, necessary. (H.R. Rep. No. 1635, p. 20)

The Department of Justice, in response to a request for its views, was careful not to state an opinion as to whether the FCC had jurisdiction over CATV.

> The principal purpose of the bill is to clarify and confirm the Commission's jurisdiction over community antenna systems in order that the Commission shall have clear authority to integrate community antenna service into the national broadcast structure in such a way as to promote maximum service to everyone, including both those

persons who are dependent upon off-the-air service and those who may receive cable service. (H.R. Rep. No. 1635, p. 21)

The minority report of the Committee did not hesitate to state its position that the Commission lacked jurisdiction over CATV and that the Commission had unlawfully usurped this jurisdiction.

> H.R. 13286 is a bill that was prepared by the Federal Communications Commission and forwarded to the Congress with the request that it be passed. It is not an administration bill. It is an attempt by a Federal agency to force Congress to give its jurisdiction which it heretofore claimed it did not have. The passage of this bill at this time would serve to underwrite an unauthorized assumption of jurisdiction by the Federal Communications Commission; it would thwart the judicial processes which are presently considering the issues involved; it would create an entirely new concept of regulation at Federal level; it would violate the constitutional guarantees of the first amendment; it would permit a Federal administrative agency (supposedly an arm of the Congress, created by the Congress) to write substantive law by the exercise of rulemaking powers; it would authorize a Federal agency, not answerable to the electorate, to repeal the laws of the several States by rulemaking powers; it would authorize monopolistic practices in the broadcasting of professional sports events and deny millions of people the opportunity of witnessing these events by television; it would create the power of censorship in the Federal Communications Commission insofar as CATV systems are concerned; it would give the Federal Communications Commission the authority in certain areas to determine what a

person could or could not receive over his television or radio set—to name a few of the flaws.

Television and radio were not intended to be regulated in the same manner as public utilities. They were subjected to regulation only because of the limited frequencies available in the spectrum. Regulation was for the sole purpose of properly policing the spectrum and seeing that it was not abused. Hence, licenses for broadcasting radio signals were required, because the spectrum was public domain and subject to the police powers of the sovereign.

The history of the Communications Act of 1927 and the amendments thereto of 1934 reflects clearly that the purpose of regulation was to make it possible for the full spectrum to be used in an orderly manner so that broadcast signals would not conflict with each other and thereby create a pandemonium of static which would be of no use to anyone. The operation of the businesses operating under licenses issued by the Government was to be on the free enterprise base. In other words, it was spelled out in the history that the Government would not have jurisdiction of the economics of the several broadcasters. Whether or not they were able to stay in business or to be successful in their operations was to be determined solely by the traditional free enterprise system upon which this country was built. Many attempts have been made by the Federal Communications Commission to gain economic control over the broadcasters. The most recent attempt was in 1963 when the Commission issued orders limiting the length and frequency of broadcast commercials. The House of Representatives struck down this

attempt by the passage of a bill denying them the power to enter the field of economic control.

H.R. 13286 as proposed by the Federal Communications Commission is an attempt to gain economic control over CATV systems and thence to move forward to gain economic control over broadcasters and thereby measurably expand the regulatory powers of the Communications Commission on a Federal basis.

A CATV system is a wired communications system and does not use the spectrum or public domain for broadcasting pruposes. Hence, the Commission has heretofore held on several occasions that it did not have jurisdiction of CATV systems as such.

There are three methods by which programs can be received by a CATV system to be transmitted over its wires:

1. The pure off-the-air system. This is the case where a high antenna is employed to catch any broadcast signals that happen to come its way.

2. The microwave-fed system. This is the system where the original broadcast is rebroadcast through the spectrum, one or several times, until it reaches its desired destination. (The FCC has jurisdiction over the microwave facility because it is a rebroadcast into the spectrum, but not over the reception facility.)

3. The coaxial cable. This is a system where a coaxial cable is employed from the broadcasting station to the CATV system. If the coaxial cable does not cross a State line, the Federal Communications Commission does not have jurisdiction. If the coaxial cable does

cross a State line, the jurisdiction of the FCC attaches under its jurisdiction over an interstate common carrier by wire. However, in this case the jurisdiction of the Commission does not extend to a determination of what can or cannot be carried over the wire.

The present bill is designed to give the Federal Communications Commission absolute control over reception by all three methods. The main objective of the Federal Communications Commission is to gain control ofer the off-the-air (subpar. 1 above) and the coaxial cable (subpar. 3 above), for by this method the Commission can gain direct control over reception of television signals insofar as all CATV systems are concerned. It has had an indirect, limited power over CATV systems using microwave. The operator of a microwave facility must get a license from the Federal Communications Commission because he is transmitting radio signals. The Commission has taken the position that it can issue a license with restrictions and conditions as to what the microwave operator can transmit, even though section 326 of the Communications Act prohibits censorship.

If the Congress passes H.R. 13286 it will open the door wide for the Federal Communications Commission to gain jurisdiction over the reception of television and radio signals—jurisdiction positively denied the Federal Communications Commission under the Communications Act as amended in 1934. It will enable the Commission to determine what can be received by the viewers of this Nation from satellite transmittals, as well as local broadcasting stations and network broadcasts. Freedom requires

that full freedom of communications and information be preserved and protected. The passage of H.R. 13286 would do irreparable damage to this freedom. The people in the fringe areas of radio and television reception would be at the mercy of the Federal Communications Commission and its rulemaking powers.

* * *

It is to be noted that the Federal Communications Commission, although previously denying jurisdiction in the field of CATV, in the early months of 1966 completely reversed their position and assumed jurisdiction over all CATV operations. Lawsuits were filed and are now pending. The Federal Communications Commission, no doubt fearing that it had flagrantly overstepped its jurisdiction, came to the Congress to put its stamp of approval on such action. It is asking the Congress at the present time to give it unbridled authority to control every aspect of the CATV business, a power it has never had over the broadcasting business, but which it wants badly—an entirely new concept in governmental regulation.

The Congress of the United States should not abdicate its legislative powers and delegate to a commission the power to write substantive law by rules and regulations promulgated by an appointed body.

If the Federal Government is to enter a new field of regulation, the manner and extent to which this will be undertaken should be definitely and explicitly spelled out by the duly elected representatives of the people of this country in the Congress of the United States and not by a board, a bureau, or a commission wholly and completely insulated from the electorate. (H.R. Rep. No. 1635, pp. 23-29)

The minority views, in respect to the powers of the Commission and its lack of jurisdiction over CATV, were not disputed by the majority, which merely urged passage of the legislation. A second minority report also strenuously objected to the jurisdictional grab by the FCC.

> Community antenna television systems have been around since 1950, and until 1965 the Federal Communications Commission very clearly indicated that it did not pretend to have jurisdiction over the transmission of broadcast signals by cable. In fact it specifically denied having such jurisdiction. Suddenly, however, the Commission did a complete turnabout and argued that it had always possessed authority to regulate cable television as an extension of broadcasting and its recognized interstate character. By a 5 to 2 decision the Commission determined that the Communications Act of 1934 meant something else and something more than it clearly is. When we consider the fact that the makeup of this Federal agency changes rapidly, such action can lead to dangerous consequences.
>
> Apparently uncertain of its ground, the Commission prepared and suggested a most peculiar piece of legislation which is H.R. 13286. Even a casual reading of this bill will indicate that it makes no attempt to determine a broad policy under which the CATV industry should develop in conjunction with the broadcasting industry. Instead it merely grants broad authority, throwing the whole problem to the Federal Communications Commission and hoping for the best.
>
> Most of the 30 amendments which were offered by members of the committee during the deliberations on this bill were intended to show the will of

Congress and to provide reasonably clear guidelines. They were offered in an attempt to make this bill at least reasonably consistent with past principles for the regulation of industry. They were defeated.

The result of passing H.R. 13286 would be to create havoc within an industry of great importance to the public because the policies adopted by the Commission for its regulation today could well be reversed or radically changed a month or a year hence. There are no general principles to which the industry can point or by which the Congress may oversee the activities of its creature, the Federal Communications Commission.

In the case of broadcasting facilities the Federal Communications Commission must allocate a frequency and issue a license therefor. In the case of community antenna systems there is no provision for licensing, but the bill does grant authority to issue permits for construction. This of course means that construction authority can be denied to any applicant. Under the terms of this bill construction permits would be within the complete discretion of the Commission. In our opinion this grants to the Federal Communications Commission a completely unacceptable and probably unconstitutional power over this industry.

* * *

There are presently pending lawsuits which will determine whether or not the Federal Communications Commission was right when it first denied having jurisdiction over CATV or whether it was right later when it reversed itself. Also pending are lawsuits to determine the applicability of the copyright laws to material carried by CATV systems.

> The determination of these matters requires no legislation and little purpose is served in passing such legislation at this time, particularly since it does not purport to lay down realistic policies and guidelines within which regulation of the CATV industry can logically proceed. (H.R. No. 1635, pp. 26-27)

The bill failed to reach the floor for vote.

APPENDIX B

Statutes and Administrative Rules
Administrative Procedure Act, 5 U.S.C.
Sections:

Section 551 - Definitions

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7) "adjudication" means agency process for the formulation of an order;

(8) "license" includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission;

(9) "licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license;

(10) "sanction" includes the whole or a part of an agency—

(A) prohibition, requirement, limitation, or other condition affecting the freedom of a person;

(B) withholding of relief;

(C) imposition of penalty or fine;

(D) destruction, taking, seizure, or withholding of property;

(E) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees;

Section 551 (Cont.)

(F) requirement, revocation, or suspension of a license; or

(G) taking other compulsory or restrictive action;

(11) "relief" includes the whole or a part of an agency—

(A) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy;

(B) recognition of a claim, right, immunity, privilege, exemption, or exception; or

(C) taking of other action on the application or petition of, and beneficial to, a person;

Section 554 - Adjudications

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved—

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;

(2) the selection or tenure of an employee, except a hearing examiner appointed under section 3105 of this title;

(3) proceedings in which decisions rest solely on inspections, tests, or elections;

(4) the conduct of military or foreign affairs functions;

(5) cases in which an agency is acting as an agent for a court; or

(6) the certification of worker representatives.

(b) Persons entitled to notice of an agency hearing shall be timely informed of—

(1) the time, place, and nature of the hearing;

(2) the legal authority and jurisdiction under which the hearing is to be held; and

(3) the matters of fact and law asserted.

Section 554 (Cont.)

When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(c) The agency shall give all interested parties opportunity for—

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not—

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply—

(A) in determining applications for initial licenses;

(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

(C) to the agency or a member or members of the body comprising the agency.

(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.

Section 556 - Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision

(a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

(b) There shall preside at the taking of evidence—

(1) the agency;

(2) one or more members of the body which comprises the agency; or

(3) one or more hearing examiners appointed under section 3105 of this title.

This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute. The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

(c) Subject to published rules of the agency and within its powers, employees presiding at hearings may—

(1) administer oaths and affirmations;

(2) issue subpenas authorized by law;

(3) rule on offers of proof and receive relevant evidence;

(4) take depositions or have depositions taken when the ends of justice would be served;

(5) regulate the course of the hearing;

(6) hold conferences for the settlement or simplication of the issues by consent of the parties;

(7) dispose of procedural requests or similar matters;

(8) make or recommend decisions in accordance with section 557 of this title; and

(9) take other action authorized by agency rule consistent with this subchapter.

Section 556 (Cont.)

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

Section 557 - Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record

(a) This section applies, according to the provisions thereof, when a hearing is required to be conducted in accordance with section 556 of this title.

(b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554 (d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by

Section 557 (Cont.)

rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule. When the agency makes the decision without having presided at the reception of the evidence, the presiding employee or an employee qualified to preside at hearings pursuant to section 556 of this title shall first recommend a decision, except that in rule making or determining applications for initial licenses—

(1) instead thereof the agency may issue a tentative decision or one of its responsible employees may recommend a decision; or

(2) this procedure may be omitted in a case in which the agency finds on the record that due and timely execution of its functions imperatively and unavoidably so requires.

(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions—

(1) proposed findings and conclusions; or

(2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and

(3) supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof.

Section 558 - Imposition of sanctions; determination of applications for licenses; suspension, revocation, and expiration of licenses

(a) This section applies, according to the provisions thereof, to the exercise of a power or authority.

Section 558 - (Cont.)

(b) A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law.

(c) When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time, shall set and complete proceedings required to be conducted in accordance with sections 556 and 557 of this title or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given—

(1) notice by the agency in writing of the facts or conduct which may warrant the action; and

(2) opportunity to demonstrate or achieve compliance with all lawful requirements.

When the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency.

Communications Act of 1934, 47 U.S.C. Sections:

Section 151 - Purposes of act; Creation of Federal Communications Commission

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication,[1] and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the "Federal Communications Commission," which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act.

Section 154 - Provisions relating to the Commission

(i) The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.

Section 303 - General powers of the Commission

(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act: *Provided, however*, that changes in the frequencies, authorized power, or in the times of operation of any station, shall not be made without the consent of the station licensee unless, after a public hearing, the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this Act will be more fully complied with;

(h) Have authority to establish areas or zones to be served by any station;

(m)(2) No order of suspension of any operator's license shall take effect until fifteen days' notice in writing thereof, stating the cause for the proposed suspension, has been given to the operator licensee who may make written application to the Commission at any time within said fifteen days for a hearing upon such order. The notice to the operator licensee shall not be effective until actually received by him, and from that time he shall have fifteen days in which to mail the said application. In the event that physical conditions prevent mailing of the application at the expiration of the fifteen-day period, the application shall then be mailed as soon as possible thereafter, accompanied by a satisfactory explanation of the delay. Upon receipt by the Commission of such application for hearing, said order of suspension shall be held in abeyance until the conclusion of the hearing which shall be conducted under such rules as the Commission may prescribe. Upon the conclusion of said hearing the Commission may affirm, modify, or revoke said order of suspension.

Section 303 (Cont.)

(p) Have authority to cause to be published such call letters and such other announcements and data as in the judgment of the Commission may be required for the efficient operation of radio stations subject to the jurisdiction of the United States and for the proper enforcement of this Act:

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.[45]

Section 307 - Allocation of facilities; term of licenses

(b)[48] In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

Section 309 - Action upon applications; form of and conditions attached to licenses

(a) Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

Section 309 (Cont.)

(e) If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. When the Commission has so designated an application for hearing, the parties in interest, if any, who are not notified by the Commission of such action may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest not more than thirty days after publication of the hearing issues or any substantial amendment thereto in the Federal Register.[54b] Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate. The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission.

Section 312 - Administrative Sanctions

(a) The Commission may revoke any station license or construction permit—

(1) for false statements knowingly made either in the application or in any statement of fact which may be required pursuant to section 308;

(2) because of conditions coming to the attention of the Commission which would warrant it in refusing to grant a license or permit on an original application;

(3) for willful or repeated failure to operate substantially as set forth in the license;

(4) for willful or repeated violation of, or willful or repeated failure to observe any provision of this Act or any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States;

(5) for violation of or failure to observe any final cease and desist order issued by the Commission under this section; or

Section 312 (Cont.)

(6) for violation of section 1304, 1343, or 1464 of title 18 of the United States Code.

(b) Where any person (1) has failed to operate substantially as set forth in a license, (2) has violated or failed to observe any of the provisions of this Act, or section 1304, 1343, or 1464 of title 18 of the United States Code, or (3) has violated or failed to observe any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States, the Commission may order such person to cease and desist from such action.

(c) Before revoking a license or permit pursuant to subsection (a), or issuing a cease and desist order pursuant to subsection (b), the Commission shall serve upon the licensee, permittee, or person involved an order to show cause why an order of revocation or a cease and desist order should not be issued. Any such order to show cause shall contain a statement of the matters with respect to which the Commission is inquiring and shall call upon said licensee, permittee, or person to appear before the Commission at a time and place stated in the order, but in no event less than thirty days after the receipt of such order, and give evidence upon the matter specified therein; except that where safety of life or property is involved, the Commission may provide in the order for a shorter period. If after hearing, or a waiver thereof, the Commission determines that an order of revocation or a cease and desist order should issue, it shall issue such order, which shall include a statement of the findings of the Commission and the grounds and reasons therefor and specify the effective date of the order, and shall cause the same to be served on said licensee, permittee, or person.

(d) In any case where a hearing is conducted pursuant to the provisions of this section, both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Commission.

(e) The provisions of section 9(b) of the Administrative Procedure Act which apply with respect to the institution of any proceeding for the revocation of a license or permit shall apply also with respect to the institution, under this section, of any proceeding for the issuance of a cease and desist order.[59]

Section 315 - Facilities for candidates for public office

(a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he

Section 315 (Cont.)

shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is hereby [61] imposed upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—

(1) bona fide newscast,

(2) bona fide news interview,

(3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),

shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this Act [61a] to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

(b) The charges made for the use of any broadcasting station for any of the purposes set forth in this section shall not exceed the charges made for comparable use of such station for other purposes.

(c) The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section.[61b]

Section 316 - Modification by Commission of construction permits or licenses

(a) Any station license or construction permit may be modified by the Commission either for a limited time or for the duration of the term thereof, if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this Act or of any treaty ratified by the United States will be more fully complied with. No such order of modification shall become final until the holder of the license or permit shall have been notified in writing of the proposed action and the grounds and reasons therefor, and shall have been given reasonable opportunity, in no event less than thirty days, to show cause by public hearing, if requested,

Section 316 (Cont.)

why such order of modification should not issue: *Provided*, That where safety of life or property is involved, the Commission may by order provide for a shorter period of notice.

(b) In any case where a hearing is conducted pursuant to the provisions of this section, both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Commission.[62]

Section 317 - Announcement with respect to certain matter broadcast

(a)(1) All matter broadcast by any radio station for which any money, service or other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person: *Provided*, That "service or other valuable consideration" shall not include any service or property furnished without charge or at a nominal charge for use on, or in connection with, a broadcast unless it is so furnished in consideration for an identification in a broadcast of any person, product, service, trademark, or brand name beyond an identification which is reasonably related to the use of such service or property on the broadcast.

(2) Nothing in this section shall preclude the Commission from requiring that an appropriate announcement shall be made at the time of the broadcast in the case of any political program or any program involving the discussion of any controversial issue for which any films, records, transcriptions, talent, scripts, or other material or service of any kind have been furnished, without charge or at a nominal charge, directly or indirectly, as an inducement to the broadcast of such program.

(b) In any case where a report has been made to a radio station, as required by section 508 of this Act, of circumstances which would have required an announcement under this section had the consideration been received by such radio station, an appropriate announcement shall be made by such radio station.

(c) The licensee of each radio station shall exercise reasonable diligence to obtain from its employees, and from other persons with whom it deals directly in connection with any program or program matter for broadcast, information to enable such licensee to make the announcement required by this section.

Section 317 (Cont.)

(d) The Commission may waive the requirement of an announcement as provided in this section in any case or class of cases with respect to which it determines that the public interest, convenience, or necessity does not require the broadcasting of such announcement.

(e) The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section.[63]

Section 326 - Censorship; indecent language

Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.[71]

Section 403 - Inquiry by Commission on its own motion

The Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which complaint is authorized to be made, to or before the Commission by any provision of this Act, or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act. The Commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this Act, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had, excepting orders for the payment of money.

Section 508 - Disclosure of certain payments

(a) Subject to subsection (d), any employee of a radio station who accepts or agrees to accept from any person (other than such station), or any person (other than such station) who pays or agrees to pay such employee, any money, service or other valuable consideration for the broadcast of any matter over such station shall, in advance of such broadcast, disclose the fact of such acceptance or agreement to such station.

(b) Subject to subsection (d), any person who, in connection with the production or preparation of any program or program matter which is intended for broadcasting over any radio station, accepts or agrees to accept, or pays or agrees to pay, any money, service or other valuable consideration for the inclusion of any matter as a part of such program or program matter, shall, in advance of such broadcast, disclose the fact of such acceptance or payment or agreement to the payee's employer, or to the person for whom such program or program matter is being produced, or to the licensee of such station over which such program is broadcast.

(c) Subject to subsection (d), any person who supplies to any other person any program or program matter which is intended for broadcasting over any radio station shall, in advance of such broadcast, disclose to such other person any information of which he has knowledge, or which has been disclosed to him, as to any money, service or other valuable consideration which any person has paid or accepted, or has agreed to pay or accept, for the inclusion of any matter as a part of such program or program matter.

(d) The provisions of this section requiring the disclosure of information shall not apply in any case where, because of a waiver made by the Commission under section 317(d), an announcement is not required to be made under section 317.

(e) The inclusion in the program of the announcement required by section 317 shall constitute the disclosure required by this section.

(f) The term "service or other valuable consideration" as used in this section shall not include any service or property furnished without charge or at a nominal charge for use on, or in connection with, a broadcast, or for use on a program which is intended for broadcasting over any radio station, unless it is so furnished in consideration for an identification in such broadcast or in such program of any person, product, service, trademark, or brand name beyond an identification which is reasonably related to the use of such service or property in such broadcast or such program.

(g) Any person who violates any provision of this section shall, for each such violation, be fined not more than $10,000 or imprisoned not more than one year, or both.[102]

Selected provisions of the Federal Communications Commission's CATV rules and regulations, 47 C.F.R. Sections:

SUBPART K—COMMUNITY ANTENNA TELEVISION SYSTEMS

[*Subpart K (§§ 74.1101–74.1109) as adopted eff. 4–18–66; except for § 74.1103 which is eff. 6–17–66 as it pertains to existing operations of nonmicrowave CATV systems and §§ 74.1105, 74.1107, and 74.1109 which are eff. 3–17–66; 111(64)–12*]

§ 74.1100 Cross reference.

See § 74.11.

[*§ 74.1100 adopted eff. 2–28–67; 111(64)–16*]

§ 74.1101 Definitions.

(a) *Community antenna television system.* The term "community antenna television system" ("CATV system") means any facility which, in whole or in part, receives directly or indirectly over the air and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more television stations and distributes such signals by wire or cable to subscribing members of the public who pay for such service, but such term shall not include (1) any such facility which serves fewer than 50 subscribers, or (2) any such facility which serves only the residents of one or more apartment dwellings under common ownership, control, or management, and commercial establishments located on the premises of such an apartment house.

(b) *Television station; television broadcast station; television translator station.* The terms "television station" and "television broadcast station" mean any television broadcasting station operating on a channel regularly assigned to its community by § 73.606 of this chapter. The term "television translator station" means a television broadcast translator station as defined in § 74.701 of this chapter. A television translator station which is licensed to and rebroadcasts the programing of a television broadcast station within that station's Grade B contour, shall be deemed an extension of the originating station.

(c) *Principal community contour.* The term "principal community contour" means the signal contour which a television station is required to place over its entire principal community by § 73.685(a) of this chapter.

(d) *Grade A and Grade B contours.* The terms "Grade A contour" and "Grade B contour" mean the field intensity contours defined in § 73.683(a) of this chapter.

(e) *Network programing.* The term "network programing" means the programing supplied by a national television network organization.

(f) *Substantially duplicated.* The term "substantially duplicated" means regularly duplicated by the network programing of one or more stations, singly or collectively, in a normal week during the hours of 6 to 11 p.m., local time, for a total of 14 or more hours.

(g) *Priority.* The term "priority" means the priority among stations established in § 74.1103(a).

(h) *Independent station.* The term "independent station" means a television station which is not affiliated with any national television network organization.

(i) *Distant signal.* The term "distant signal" means the signal of a television broadcast station which is extended or received beyond the Grade B contour of that station.

§ 74.1103 Requirement relating to distribution of television signals by community antenna television systems.

No community antenna television system shall supply to its subscribers signals broadcast by one or more television stations, except in accordance with the following conditions:

(a) *Stations required to be carried.* Within the limits of its channel capacity, any such CATV system shall carry the signals of operating or subsequently authorized and operating television broadcast and 100 watts or higher power translator stations in the following order of priority, upon the request of the licensee or permittee of the relevant station:

(1) First, all commercial and noncommercial educational stations within whose principal community contours the system or the community of the system is located, in whole or in part;

(2) Second, all commercial and noncommercial educational stations within whose Grade A contours the system or the community of the system is located, in whole or in part;

(3) Third, all commercial and noncommercial educational stations within whose Grade B contours the

system or the community of the system is located, in whole or in part; and

(4) Fourth, all commercial and noncommercial educational translator stations operating in the community of the system, in whole or in part, with 100 watts or higher power.

(b) *Exceptions.* Nothwithstanding the requirements of paragraph (a) of this section,

(1) The system need not carry the signal of any station, if (i) that station's network programing is substantially duplicated by one or more stations of higher priority, and (ii) carrying it would, because of limited channel capacity, prevent the system from carrying the signal of an independent commercial station or a noncommercial educational station.

(2) In cases where (i) there are two or more signals of equal priority which substantially duplicate each other, and (ii) carrying all such signals would, because of limited channel capacity, prevent the system from carrying the signal of an independent commercial station or a noncommercial educational station, the system need not carry all such substantially duplicating signals, but may select among them to the extent necessary to preserve its ability to carry the signals of independent commercial or noncommercial educational stations.

(3) The system need not carry the signal of any television translator station if: (i) The system is carrying the signal of the originating station, or (ii) the system is within the Grade B or higher priority contour of a station carried on the system whose programing is substantially duplicated by the translator; *Provided, however,* That where the originating station is carried in place of the translator station, the priority for purposes of paragraph (e) of this section shall be that of the translator station unless the priority of the originating station is higher.

(4) In the event that the system operates, or its community is located, within the Grade B or higher priority contours of both a satellite and its parent station, the system need carry only the station with the higher priority, if the satellite station and its parent station are of equal priority, the system may select between them.

(c) *Special requirements in the event of nonCarriage.* Where the system does not carry the signals of one or more stations within whose Grade B or higher priority contour it operates, or the signals of one or more 100

watts or higher power translator stations located in its community, the system shall offer and maintain, for each subscriber, an adequate switching device to allow the subscriber to choose between cable and noncable reception, unless the subscriber affirmatively indicates in writing that he does not desire this device.

(d) *Manner of carriage.* Where the signal of any station is required to be carried under this section,

(1) The signal shall be carried without material degradation in quality (within the limitations imposed by the technical state of the art);

(2) The signal shall, upon request of the station licensee or permittee, be carried on the system on the channel on which the station is transmitting (where practicable without material degradation); and

(3) The signal shall, upon the request of the station licensee or permittee, be carried on the system on no more than one channel.

(e) *Stations entitled to program exclusivity.* Any such system which operates, in whole or in part, within the Grade B or higher priority contour of any commercial or noncommercial educational television station or within the community of a fourth priority television translator station, and which carries the signal of such station shall, upon request of the station licensee or permittee, maintain the station's exclusivity as a program outlet against lower priority or more distant duplicating signals, but not against signals of equal priority, in the manner and to the extent specified in paragraphs (f) and (g) of this section.

(f) *Program exclusivity; extent of protection.* Where a station is entitled to program exclusivity, the CATV system shall, upon the request of the station licensee or permittee, refrain from duplicating any program broadcast by such station, on the same day as its broadcast by the station, if the CATV operator has received notification from the requesting station of the date and time of its broadcast of the program and the date and time of any broadcast to be deleted, as soon as possible and in any event no later than 48 hours prior to the broadcast to be deleted. Upon request of the CATV system, such notice shall be given at least 8 days prior to the date of any broadcast to be deleted.

(g) *Exceptions.* Notwithstanding the requirements of paragraph (f) of this section.

(1) The CATV system need not delete reception of a

network program if, in so doing, it would leave available for reception by subscribers, at any time, less than the programs of two networks (including those broadcast by any stations whose signals are being carried and whose program exclusivity is being protected pursuant to the requirements of this section);

(2) The system need not delete reception of a network program which is scheduled by the network between the hours of 6 and 11 p.m., eastern time, but is broadcast by the station requesting deletion, in whole or in part, outside of the period which would normally be considered prime time for network programing in the time zone involved;

(3) The system need not delete reception of any program consisting of the broadcast coverage of a speech or other event as to which the time of presentation is of special significance, except where the program is being simultaneously broadcast by a station entitled to program exclusivity; and

(4) The system need not delete reception of any program which would be carried on the system in color but will be broadcast in black and white by the station requesting deletion.

[§ 74.1103(a) *and* (b)(3) *amended,* (b)(4) *adopted eff. 2-28-67; III(64)-16*]

§ 74.1105 Notification prior to the commencement of new service.

(a) No CATV system shall commence operations in a community or commence supplying to its subscribers the signal of any television broadcast station carried beyond the Grade B contour of the station, unless the system has given prior notice of the proposed new service to the licensee or permittee of any television broadcast station within whose predicted Grade B contour the system operates or will operate, and to the licensee or permittee of any 100 watts or higher power translator station operating in the community of the system, and has furnished a copy of each such notification to the Federal Communications Commission, within sixty (60) days after obtaining a franchise or entering into a lease or other arrangement to use facilities; in any event, no CATV system shall commence such operations until thirty (30) days after notice has been given. Such notice shall be given by existing systems

which propose to add new distant signals at least thirty (30) days prior to commencing service and by systems which propose to extend lines into another community within sixty (60) days after obtaining a franchise or entering into a lease or other arrangement to use facilities or where no new local authorization or contractual arrangement is necessary, at least thirty (30) days prior to commencing service. Where it is proposed to extend the signal of any noncommercial educational television station beyond its Grade B contour into a community with an unoccupied reserved educational television channel assignment under § 73.606 of this chapter, the notice shall also be served upon the superintendents of schools in the community and county in which the system will operate and the local, area, and State educational television agencies, if any.

(b) The notice shall include the name and address of the system, identification of the community to be served, the television signals to be distributed, and the estimated time operations will commence.

(c) Where a petition with respect to the proposed service is filed with the Commission, pursuant to § 74.1109 of this chapter, within thirty (30) days after notice, new service which is challenged in the petition shall not be commenced until after the Commission's ruling on the petition or on the interlocutory question of temporary relief pending further procedures; *Provided, however,* That service shall not be commenced in violation of the terms of any specified temporary relief or of the provisions of § 74.1107 of this chapter. Where no petition pursuant to § 74.1109 has been filed within thirty (30) days after notice, service may be commenced at any time thereafter, subject, however, to the provisions of § 74.1107.

(d) The provisions of this section do not apply to any signals which were being supplied to subscribers in the community of the CATV system on March 17, 1966, unless it is proposed to extend lines into another community.

NOTE 1: As used in § 74.1105, the term "predicted Grade B contour" means the field intensity contour defined in § 73.683(a) of this chapter, the location of which is determined exclusively by means of the calculations prescribed in § 73.684 of this chapter.

NOTE 2: As used in § 74.1105, the term "television broadcast station" includes foreign television broadcast stations.

[*§ 74.1105 amended in III(64)-16; Note 2 adopted eff. 7-14-67; III(64)-18*]

§ 74.1107 Requirement for showing in evidentiary hearing and Commission approval in top 100 television markets; other procedures.

(a) No CATV system operating in a community within the predicted Grade A contour of a television broadcast station in the 100 largest television markets shall extend the signal of a television broadcast station beyond the Grade B contour of that station, except upon a showing approved by the Commission that such extension would be consistent with the public interest, and specifically the establishment and healthy maintenance of television broadcast service in the area. Commission approval of a request to extend a signal in the foregoing circumstances will be granted where the Commission, after consideration of the request and all related materials in a full evidentiary hearing, determines that the requisite showing has been made. The market size shall be determined by the rating of the American Research Bureau, on the basis of the net weekly circulation for the most recent year.

(b) A request under paragraph (a) of this section shall be filed after the CATV system has obtained any necessary franchise for operation or has entered into a lease or other arrangement to use facilities and shall set forth the name of the community involved, the date on which a franchise was obtained, the signal or signals proposed to be extended beyond their Grade B contours, the date on which copies of the notifications required by § 74.1105 of this chapter were filed with the Commission, and the specific reasons why it is urged that such extension is consistent with the public interest. Public notice will be given of the filing of such a request, and interested parties may file a response or statement within thirty (30) days after such public notice. A reply to such a response or statement may be filed within a twenty (20) day period thereafter. The Commission shall designate the request for an evidentiary hearing on issues to be specified, with the burden of proof and the burden of proceeding with the introduction of evidence upon the CATV system making the request, unless otherwise specified by the Commission as to particular issues.

(c) No CATV system, located so as to fall outside the provisions of paragraph (a) of this section, shall extend the signal of a television broadcast station beyond the Grade B contour of that station, where the Commission on its own motion or pursuant to a

petition filed under § 74.1109, determines, after appropriate proceedings, that such extension would be inconsistent with the public interest, taking into account particularly the establishment and healthy maintenance of television broadcast service in the area.

(d) The provisions of paragraphs (a) and (b) of this section shall not be applicable to any signals which were being supplied by a CATV system to its subscribers in a community on February 15, 1966, and pursuant to a franchise (where necessary) issued on or before that date: *Provided, however,* That any new franchise or amendment of an existing franchise after February 15, 1966, to operate or extend the operations of the CATV system in the same general area or any extension into another community does come within the provisions of paragraphs (a) and (b) of this section: *And provided further,* That no CATV system located in a community in the 100 largest television markets, which was supplying to its subscribers on February 15, 1966, a signal carried beyond its Grade B contour, shall extend such service to new geographical areas within the same community where the Commission, upon petition filed under § 74.1109 by a television broadcast station or other interested person located in the area and after consideration of the response of the CATV system and appropriate proceedings, determines that the public interest, taking into account the considerations set forth in the Second Report and Order in Docket Nos. 14895, 15233, and 15971, FCC 66–220, paragraphs 113–149, would be served by appropriate conditions limiting the geographical extension of the system to new areas in the community. The Commission may also consider, upon the basis of the pleadings before it, whether temporary relief is called for in the public interest, and, if so, the nature of such relief; no CATV system coming within the foregoing provision shall extend its service to new geographical areas in violation of the terms of the specified temporary relief.

(e) Within 60 days of issuance of a request filed pursuant to paragraph (a) of this section, interested parties seeking simultaneous consideration with such request must file appropriate requests for any other CATV system in the same television market. All requests for CATV systems in a given market timely filed with respect to the first request will be processed and considered simultaneously. Later filed requests for the particular market will be subject to chronological processing and may not be considered in the same pro-

ceeding as the earlier requests.

NOTE 1: As used in § 74.1107, the term "television broadcast station" includes foreign television broadcast stations.

[§ 74.1107 *amended in III(64)–16 and III(64)–17; Note 1 adopted eff. 7–14–67; III(64)–18*]

§ 74.1109 Procedures applicable to petitions for waiver of the rules, additional or different requirements and rulings on complaints or disputes.

(a) Upon petition by a CATV system, an applicant, permittee, or licensee of a television broadcast, translator, or microwave relay station, or by any other interested person, the Commission may waive any provision of the rules relating to the distribution of television broadcast signals by CATV systems, impose additional or different requirements, or issue a ruling on a complaint or disputed question.

(b) The petition may be submitted informally, by letter, but shall be accompanied by an affidavit of service on any CATV system, station licensee, permittee, applicant, or other interested person who may be directly affected if the relief requested in the petition should be granted.

(c) (1) The petition shall state the relief requested and may contain alternative requests. It shall state fully and precisely all pertinent facts and considerations relied upon to demonstrate the need for the relief requested and to support a determination that a grant of such relief would serve the public interest. Factual allegations shall be supported by affidavit of a person or persons with actual knowledge of the facts, and exhibits shall be verified by the person who prepares them.

(2) A petition for a ruling on a complaint or disputed question shall set forth all steps taken by the parties to resolve the problem, except where the only relief sought is a clarification or interpretation of the rules.

(d) Interested persons may submit comments or opposition to the petition within thirty (30) days after it has been filed. Upon good cause shown in the petition, the Commission may, by letter or telegram to known interested persons, specify a shorter time for such submissions. Comments or oppositions shall be served on petitioner and on all persons listed in petitioner's affidavit of service, and shall contain a detailed full showing, supported by affidavit, of any facts or

considerations relied upon.

(e) The petitioner may file a reply to the comments or oppositions within twenty (20) days after their submission, which shall be served upon all persons who have filed pleadings and shall also contain a detailed full showing, supported by affidavit, of any additional facts or considerations relied upon. Upon good cause shown, the Commission may specify a shorter time for the filing of reply comments.

(f) The Commission, after consideration of the pleadings, may determine whether the public interest would be served by the grant, in whole or in part, or denial of the request, or may issue a ruling on the complaint or dispute. The Commission may specify other procedures, such as oral argument, evidentiary hearing, or further written submissions directed to particular aspects, as it deems appropriate. In the event that an evidentiary hearing is required, the Commission will determine, on the basis of the pleadings and such other procedures as it may specify, whether temporary relief should be accorded to any party pending the hearing and the nature of any such temporary relief. Where a petition involves new service to subscribers (other than service coming within the provisions of § 74.1107(a) of this chapter), the Commission will expedite its consideration and promptly issue a ruling either on the merits of the petition or on the interlocutory question of temporary relief pending further procedures.

(g) Where a request for temporary relief is contained in a petition with respect to service coming within the provisions of § 74.1107(d) of this chapter, opposition to such request for temporary relief shall be filed within ten (10) days and reply comments within seven (7) days thereafter. The commission will expedite its consideration of the question of temporary relief.

(h) Where a petition for waiver of the provisions of § 74.1103(a) of this chapter is filed within fifteen (15) days after a request for carriage, the system need not carry the signal of the requesting station pending the Commission's ruling on the petition or on the interlocutory question of temporary relief pending further procedures.

[*Subpart K (§§ 74.1101–74.1109) as adopted eff. 4–18–66, except for § 74.1103 which is eff. 6–17–66 as it pertains to existing operations of nonmicrowave CATV systems and §§ 74.1105, 74.1107, and 74.1109 which are eff. 3–17–66; III(64)–12; § 74.1109(h) as adopted eff. 6–17–66; III(64)–13.*]